European Media Law

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Nr. 91-100 selected and summarised by Dirk VOORHOOF and Ronan Ó FATHAIGH

Article 10 of the European Convention on Human Rights

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

1.- Sunday Times (n° 1) v. the United Kingdom, 26 April 1979 (contempt of court, presumption of innocence, trial by newspaper, injunction order, prior restraint)

The first case in which the Court had to take a decision on the merits in respect of freedom of expression and information in the context of **journalistic reporting by the press** was in the *Sunday Times* (n° 1) case. In this judgment the Court emphasised that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable **not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State** or any sector of the population. This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be interpreted narrowly. The Court held that there had been a violation of Article 10 by reason of an injunction restraining the publication in the *Sunday Times* of an article concerning a drug and the litigation linked to its use (thalidomide case). The injunction, based on the English law on contempt of court, was not found to be "necessary in a democratic society".

The Court held that the courtroom being a forum for the settlements of disputes did not mean "that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large". It is recognised that **the courts cannot operate in a vacuum and that the press must be in the possibility to report about the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public**. It is emphasised that the media have not only the task of imparting such information and ideas: the public has also a right to receive them. The Court observed that the thalidomide disaster was a matter of undisputed public concern and that **the public had the right to be properly informed**. The Court concluded that the interference complained of by the *Sunday Times* did indeed not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The restraint imposed on the Sunday Times was not necessary in

a democratic society for maintaining the authority of the judiciary. Accordingly there has been a violation of Article 10 of the Convention.

(See also Worm v. Austria, 29 August 1997 and Du Roy and Malaurie v. France, 3 October 2000. Compare with Tourancheau and July v. France, 24 November 2005)

2.- Lingens v. Austria, 8 July 1986 (defamation of a politician, value judgment)

In 1975 the applicant journalist was fined for criminal defamation of Bruno Kreisky, the Chancellor of Austria at that time. Lingens had published two articles in the Vienna magazine *Profil* in which he had criticised Kreisky for having protected former members of the SS for political reasons and for his accommodating attitude towards former Nazis in Austrian politics. These articles were published in the context of a post-telection political controversy. Lingens was convicted because he had used certain very negative expressions criticising Mr. Kreisky, such as "basest opportunism", "immoral" and "undignified". According to the European Court Lingens' conviction by the Austrian judicial authorities was a breach of Article 10 of the Convention. The Court reiterated **the crucial importance of freedom of political debate and press freedom in a democratic society**: "Whilst the press must not overstep the bounds set, inter alia, for the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them".

The Court continues: "Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by journalists and the public at large, and he must consequently display a greater degree of tolerance". In the Court's view, **the facts on which Lingens founded his negative value judgments visàvis Kreisky were undisputed, as was also the journalist's good faith**. According to the Court, the requirement of the Austrian Criminal Code that the journalist had to prove the truth of his statements, was impossible of fulfilment and infringed the freedom of opinion itself, which is a fundamental part of the right secured by Article 10. The existence of facts can be demonstrated, whereas **the truth of value judgments is not susceptible of proof.**

(See also Castells v. Spain, 23 April 1992).

3.- Oberschlick (n° 1) v. Austria, 23 May 1991 (defamation of politician, provocation)

The applicant is an Austrian journalist, residing in Vienna. In the periodical *Forum* he published the full text of a criminal complaint which he and other persons had laid against an Austrian politician, Mr. Graber-Meyer. In an election campaign, this politician had made certain discriminatory or even racist statements concerning migrant workers and family allowances. Oberschlick expressed the opinion that the statements of Graber-Meyer corresponded to the philosophy and the aims of National Socialism. The politician thereupon instituted a private prosecution for defamation. Oberschlick was convicted and fined and the seizure of the relevant issue of *Forum* was ordered.

According to the European Court, **the task of the media is to impart information and ideas on political issues and on other matters of general interest**. It is underlined that the freedom of political debate is at the very core of the concept of a democratic society, which prevails throughout the Convention. The Court notes that **a politician must display a greater degree of tolerance with regard to criticism, especially when he himself makes public statements that are susceptible of criticism**: "A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interest of open discussion of political issues". The Court is of the opinion that "the insertion of the text of the said information in *Forum* contributed to a public debate on a political question of general importance. In particular, the issue of different treatment of nationals and foreigners in the social field has given rise to considerable discussion not only in Austria but also in other member States of the Council of Europe. Mr. Oberschlick's criticism (..) sought to draw the public's attention in a provocative manner to a proposal made by a politician which was likely to shock the people. A politician who expresses himself in such terms

exposes himself to a strong reaction on the part of journalists and the public". The Court reached the conclusion that the conviction of Oberschlick by the Austrian courts was to be considered as a breach of Article 10 of the European Convention.

4.- Thorgeir Thorgeirson v. Iceland, 25 June 1992 (criticising the police, burden of proof, rumours, intention)

Thorgeir Thorgeirson is the author of two articles published in the Reykjavik daily newspaper *Morgunblaoio*. In these articles Thorgeirson commented on alleged police brutality by the metropolitan police. He was convicted for defamation.

According to the European Court of Human Rights, this conviction and sentence for defamation was a violation of Article 10 of the Convention. The Court once more referred to the "preeminent role of the press in a State governed by the rule of law" and to the vital role of the press as a "public watchdog". The Court emphasised that Article 10 gives protection to freedom of expression in the context of political discussion, as well as on discussion of other matters of public concern. **Although the applicant was essentially reporting what was being said by others about police brutality, this was considered as a sufficient basis by the Court to report about brutalities by unspecified members of the Reykjavik police. In as far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task.**

The Court also was of the opinion that the critical articles published by the applicant were not aimed to damage the reputation of the Reykjavik police: it was Thorgeirson's intention to urge the Minister of Justice to set up an independent and impartial body to investigate complaints of police brutality. The Court admitted that the articles were "framed in particularly strong terms", but **regarding their purpose and intention,** the Court was of the opinion that the language used could not be estimated as excessive. Finally, the Court considered that the conviction and sentence were capable of discouraging open discussion of matters of public concern.

5.- Jersild v. Denmark, 23 September 1994 (incitement to racism, intention, interview)

The Jersild judgment concerns the case of a Danish journalist who was sentenced to a fine for having aided and abetted the dissemination of racist remarks made by extremist youths in a television programme he produced. As a starting point, the Court emphasises its particular consciousness of **the vital importance of combating racial discrimination in all its forms and manifestations.** The European Court also underlines the importance of the role of the press as well as the importance of the audiovisual media in a democratic society. The Court considers that "news reporting based on interviews, whether edited or not, constitutes one of the most important means whereby **the press is able to play its vital role as public watchdog**". At the same time the Court noticed that in considering the duties and responsibilities of a journalist, the potential impact of the medium concerned is an important factor and that it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media. According to the Court "the audiovisual media have means of conveying through images meanings which the print media are not able to impart".

The Court is of the opinion that the punishment of a journalist for assisting in the dissemination of racist statements made by another person in an interview would seriously hamper the **contribution of the press to discussion of matters of public interest** and should be envisaged unless there are particularly strong reasons for doing so. A significant feature of the case is that the applicant did not make the objectionable statements himself, but that he assisted in their dissemination in his capacity of television journalist responsible for a news programme. Furthermore, the item was broadcast as a part of a serious Danish news programme and was intended for a well-informed audience. The Court also underlines that the methods of objective and balanced reporting may vary considerably and that it "is not for the Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists". The Court finally recalls that Article 10 "protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed". After a thorough examination of the content of the program the Court comes to the opinion that the purpose of the applicant TV-

journalist in compiling the broadcast in question was not racist.

Taking into account and balancing all these elements of the case, the Court reaches the conclusion that the conviction of the journalist by the Danish courts is to be considered as a violation of Article 10 ECHR.

6.- Goodwin v. the United Kingdom, 27 March 1996 (protection of journalistic sources, unless overriding requirement in the public interest)

In 1990 William Goodwin, a trainee-journalist working for the financial magazine *The Engineer* was found guilty by the House of Lords of contempt of court because he refused to disclose the identity of a person who previously supplied him with financial information derived from a confidential corporate plan of a private company. The disclosure order was estimated to be in conformity with Section 10 of the Contempt of Court Act of 1981, as the disclosure was held to be necessary in the interest of justice. The European Court however is of the opinion that the impugned disclosure order is in breach of Article 10 of the Convention. The Court firmly underlines the principle that "**protection of journalistic sources is one of the basic conditions for press freedom**" and that "without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest". The Court emphasises that without protection of a journalist's sources "the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected". The Court considers that a disclosure order cannot be compatible with Article 10 of the Convention unless it is justified by an **overriding requirement in the public interest**. As the Court pointed out: "In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court". The European Court *in casu* is of the opinion that the interests of the private company in eliminating, by proceedings against the source, the (residual) threat of damage through dissemination of the confidential information, are not sufficient to outweigh the vital public interest in the protection of the applicant journalist's source.

(See also Roemen and Schmit v. Luxembourg, 25 February 2003 and Ernst and others v. Belgium, 15 July 2003).

7.- De Haes and Gijsels v. Belgium, 24 February 1997 (criticising judges, burden of proof, protection of sources)

In Belgium, two journalists of the weekly magazine *Humo* were convicted by a civil court for abuse of freedom of the press and for having exceeded the limits of acceptable criticism by insulting and defaming four members of the judiciary. In several articles, De Haes en Gijsels had accused three judges and an Advocate-General of marked bias and cowardice. The two journalists especially expressed the opinion that the judges hadn't been impartial in their handling of a case on the custody and sexual abuse of children (case of Mr. X).

The Court however is of the opinion that the conviction of the two journalists because of their accusations of bias and lack of independence against the judges and the Advocate-general, is a breach of Article 10 of the Convention.

The Court considers that "the articles contain a mass of detailed information about the circumstances in which the decisions and the custody of Mr. X's children were taken. That **information was based on thorough research** into the allegations against Mr. X and the opinions of several experts who were said to have advised the applicants to disclose them in the interests of the children (...)". Hence the journalists "cannot be accused of having failed their professional obligations by publishing what they had learned about the case. It is incumbent of the press to impart information and ideas of public interest". Even the revelation by the journalists of the political sympathies of the judges in itself was not to be seen as defamatory. As the Court notes: "the facts which they believed they were in a position to allege concerning those persons' political sympathies could be regarded as potentially lending credibility to the idea that those sympathies were not irrelevant to the decisions in question".

The Court also decides: "Looked at against the background of the case, the accusations in question amount to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance (..) Although Mr. De Haes' and Mr. Gijsels' comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists' polemical and even aggressive tone, which

the Court should not be taken to approve, it must be remembered that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. (...) **Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation**".

8.- Oberschlick (n° 2) v. Austria, 1 July 1997 (criticising a politician as an "idiot" is protected political speech)

In 1990 a speech of the leader of the Austrian Freedom Party (FPÖ), Mr. Haider, was reproduced in the periodical *Forum*. In that speech Haider glorified the role of the "generation of soldiers" who had taken part in the Second World War, including those who had, according to Haider, fought for peace and freedom in the German Army. The speech was commented by Oberschlick who qualified Haider as an "idiot" or a "nazi" ("Trottel" statt "Nazi"). Haider brought an action for defamation and insult against Oberschlick, who was found guilty by the Austrian courts under Article 115 of the Criminal Code (insult/"Schimpfwort").

The European Court however disagreed with this conviction. In the Court's view, "the applicant's article, and in particular the word Trottel, may certainly be considered polemical, but they did not on that account constitute a gratuitous personal attack as Oberschlick provided an objectively understandable explanation for them derived from Mr. Haider's speech, which in itself was provocative. As such they were **part of the political discussion provoked by Mr. Haider's speech and amount to an opinion, whose truth is not susceptible of proof**. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but in the light of the above considerations, that was not so in this instance". The Court concluded that the necessity of the interference with the exercise of Oberschlick's freedom of expression has not been shown. There has therefore been a breach of Article 10 of the Convention.

(See also Lopes Gomes da Silva v. Portugal, 28 September 2000 and Andreas Wabl v. Austria, 21 March 2000, "nazi-journalism")

9.- Fressoz and Roire v. France, 21 January 1999 (the right of journalists to receive and publish confidential documents)

In its first judgment after the reorganisation of the European Court of Human Rights according to the 11th Protocol (November 1998), the Court decided strongly in favour of the protection of journalists and emphasised once again the importance of the freedom of the press and its vital role in a democratic society.

The applicants both were convicted in France for the publication of an article in the satirical newspaper *Le Canard Enchaîné*. The article and the documents it contained showed that the Peugeot managing director, Mr. Calvet, had received large pay increases while at the same time the management refused the demands of the workers of Peugeot to a pay rise. Mr. Fressoz, the publication director of the magazine at that time and Mr. Roire, the journalist who wrote the article, were convicted for receiving and publishing photocopies that had been obtained through a breach of duty of confidentiality by an unidentified tax official. They both claimed that these convictions violated their freedom of expression as protected by Article 10 of the European Convention.

The Court at the one hand emphasises that **journalists in principle cannot be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection of freedom of expression. However, in particular circumstances the interest of the public to be informed and the vital role of the press can justify the publication of documents that fall under an obligation of professional secrecy.** Taking into consideration the fact that the article contributed to a public debate on a matter of general interest, that the information on the salary of Mr. Calvet as head of a major industrial company did not concern his private life and that this information already had been known to a large number of people, the Court is of the opinion that there was no overriding requirement for the information to be protected as confidential. As a matter fact the conviction was based on the publication of documents of which the divulgation was prohibited, but the information itself they contained was not confidential. The Court emphasises that in essence **Article 10 of the Convention "leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility.** Its protects journalists' rights to divulge information on issues of general interest provided that

they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism". In the Court's view the publication of the tax assessments were relevant not only to the subject matter but also to the credibility of the information supplied, while at the same time the journalist had acted in accordance with the standards governing his profession of a journalist. The final and unanimous conclusion of the Court, sitting in Grand Chamber, is that there was no reasonable relationship of proportionality between the legitimate aim pursued by the journalist's conviction and the means deployed to achieve that aim, given the interest a democratic society has in ensuring and preserving freedom of the press. The Court decided that there has been a violation of Article 10 of the Convention.

10.- Bladet Tromsø and Stensaas v. Norway, 20 May 1999 (defamatory allegations based on (still confidential) official document)

In 1992 the Newspaper Company *Bladet Tromsø* and its editor, Pal Stensaas, were convicted by a Norway district court for defamation. The newspaper had published several articles on seal hunting as well as an official - but secret - report that referred to a series of violations of the seal hunting regulations (Lindberg report). The article and the report more specifically made allegations against five crew members of the seal hunting vessel M/S Harmoni who were held responsible for illegal methods of killing seals. Although the names of the concerned persons were deleted, the crewmembers of the M/S Harmoni brought defamation proceedings against the newspaper and its editor. The district court was of the opinion that some of the contested statements in the article and the report as a matter of fact were "null and void" and the newspaper and its editor were ordered to pay damages to the plaintiffs.

The Court came to the conclusion that the conviction by the Norwegian district court was in breach of Article 10 of the European Convention. The Court took account of the overall background against which the statements in question had been made, notably the controversial that seal hunting represented at the time in Norway and the public interest in these matters. The Court also underlined that the manner of reporting in question should not be considered solely by reference to the disputed articles but in the wider context of the newspaper's coverage of the seal hunting issue. According to the Court "the impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported". The Court however underlined that Article 10 of the Convention does not guarantee an unrestricted freedom of expression even with respect to media coverage of matters of public concern, as the crew members can rely on their right to protection of their honour and reputation or their right to be presumed innocent of any criminal offence until proven guilty. According to the Court some allegations in the newspaper's articles were relatively serious, but the potential adverse effect of the impugned statements on each individual seal hunter's reputation or rights was significantly attenuated by several factors. In particular, the Court was of the opinion that "the criticism was not an attack against all the crew members or any specific crew member". On the other hand the Court emphasised that **the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research, because otherwise, the "vital public-watchdog role" of the press might be undermined**. The Court reached the following conclusion: "Having regard to the various factors limiting the likely harm to the individual seal hunter's reputation and to the situation as it presented itself to *Bladet Tromsø* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect".

It is to be mentioned that 4 judges of 17 dissented with the majority. In the dissenting opinions, annexed to the judgment, it is argued why the articles are to be considered as defamatory towards private individuals. According to the minority judges the Court has not given sufficient weight to the reputation of the seal hunters. The minority opinion also disagrees with the publication of the secret report and the fact that the newspapers took the allegations formulated in the report for granted: "How could it have been "reasonable" to rely on this report when the newspaper was fully aware that the Ministry had ordered that the report not be made public immediately because it had contained possibly libellous comments concerning private individuals?". In an unusually sharp conclusion, the minority judges are of the opinion that the Court sends the wrong signal to

the press in Europe and that the judgment undermines respect for the ethical principles which the media voluntarily adhere to. Their final conclusion is: "Article 10 may protect the right for the press to exaggerate and provoke but not to trample over the reputation of private individuals".

However, let there be no misunderstanding: the judgment of 20 May 1999 in the case of *Bladet Tromsø* versus Norway has far reaching implications for the interpretation of the balancing of journalistic freedom and the protection of the rights or reputation of others. It is obvious that a clear majority of the Court argues in favour of the public watchdog-function of the media and the critical reporting on matters of public concern. And although this freedom is not totally unrestricted, according to the actual jurisprudence of the Court, the freedom with respect to press coverage of matters of serious public concern is extremely wide.

11.- Sürek v. Turkey and other cases v. Turkey, 8 July 1999 (incitement to violence and hatred, criticising the government, separatist propaganda, interviews with representants of terrorist organisations, the publisher's responsibility)

On 8 July 1999 the European Court of Human Rights delivered judgment in thirteen cases against Turkey involving Article 10 of the Convention. In eleven of the thirteen cases the Court held that there has been a violation of the freedom of expression. All cases concern different criminal convictions of the applicants because of separatist propaganda against the Turkish nation and the territorial integrity of the State (art. 159 and 312 of the Criminal Code) or propaganda against the indivisibility of the State contrary to the Prevention of Terrorism Act 1991 (Act nr. 3712 of 12 April 1991).

In the case of Arslan v. Turkey the applicant was sentenced, as he was the author of a book under the title "History in mourning, 33 bullets". The book described the Turkish nation as barbarous and that the Kurds were the victims of a constant oppression, if not genocide.

The case of Polat v. Turkey concerns the publication of a book entitled "We made each dawn a Spring Festival". The book evocated some historical episodes that marked the Kurdish rebel movements in Turkey and also described the ill treatment of prisoners in the Diyarbakir Prison.

Baskaya and Okçuoglu applied before the European Court as they have been convicted as the author and the publisher of a book entitled "Westernisation, Modernisation, Development – Collapse of a Paradigm. An Introduction to the Critique of the Official Ideology". In the book it was mentioned that part of Turkish territory in fact belongs to "Kurdistan" and that the Turkish State is an oppressor in political, cultural and ideological terms. All copies of the book were seized. Baskaya was sentenced to imprisonment of 20 months and was dismissed from his post as a university professor.

Karatas v. Turkey concerns the author of an anthology of poems under the title "The song of a rebellion – Dersim". Karatas was convicted because some of the poems referred to a particular region of Turkey as "Kurdistan" and glorified the Kurd's fight for national independence.

In the case Erdogdu and Ince v. Turkey the editor of the monthly review *Democratic Opposition,* Mr. Erdogdu, was sentenced because of the publication of an interview with a sociologist, Mr. Ince. The interview focused on the Kurdish struggle for independence and on the role of the PKK and the Turkish army.

In the case Ceylan v. Turkey the applicant, a former president of the petroleum workers' union, was convicted because of an article published in a weekly newspaper. The article under the title "The time has come for the workers to speak out – tomorrow will be to late", dealt with the Kurdish question in Turkey.

Okçuoglu v. Turkey concerns the conviction of a lawyer for holding a speech concerning the Kurdish question and for having his text published in the review *Democrat*. The article was entitled "The past and present of the Kurdish problem".

Gerger v. Turkey concerns the case of a journalist who was sentenced to 20 months' imprisonment for having drafted a message that was read out in public at a memorial ceremony and was considered as to contain pro-Kurdish separatist propaganda.

Sürek and Özdemir v. Turkey concerns a publisher and an editor-in-chief both held responsible for the publication of an article in a weekly review which contained an interview with a leader of the PKK.

In four other different cases Mr. Sürek is the applicant. As a publisher, he was convicted for several articles published in the weekly review *Hab-*

erde Yorumda Gerçek, all dealing with the Kurdish problem and some of them containing references to Kurdistan as an independent region and the PKK as a liberation movement. Mr. Sürek was found guilty of disseminating propaganda against the indivisibility of the Turkish State. The case Sürek n° 1 concerns the publication of two letters which had been submitted by readers and in which the military actions in South-east Turkey were vehemently condemned and the authorities were accused of brutal repression of the Kurdish people. In the case of Sürek n° 2 an article was published in which the identity was revealed of officials mandated to fight terrorism and suggesting misconduct on their part having ordered to open fire on the local population of Sirnak. According to the authorities the disclosure of the names of these persons rendered them terrorist targets and had put their lives at danger from terrorist attack. Sürek n° 3 concerns the publication of a news commentary presenting the activities of PKK in a positive perspective, while Sürek n° 4 *inter alia* concerns the publication of an interview with a representative of the National Liberation Front of Kurdistan, the political wing of PKK.

In all cases the European Court reiterates the fundamental principles underlying its former judgments relating to Article 10, according to which freedom of expression constitutes one of the essential foundations of a democratic society. The Court emphasises once again that Article 10 of the Convention also protects information and ideas that "offend, shock or disturb" and recalls that there is little scope under Article 10 of the Convention for restrictions **on political speech or on debate on questions of public interest**. At the same time, the limits of **permissible criticism are wider with regard to the government** than in relation to a private citizen: in a democratic society the actions or omissions of the government must be subject to the close scrutiny of public opinion. According to the Court, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. It is incumbent on the press to impart information and ideas on political issues, including divisive ones and the public has also a right to receive such information and ideas. On the other hand, the Court recognises the competence of state authorities as to take measures to guarantee public order and hence to interfere with freedom of expression in cases of incitement to violence against individuals, public officials or a sector of the population. It is also underlined that the duties and responsibilities which accompany the exercise of the right of freedom of expression by media professionals assume special significance in situations of conflict and tension and that particular caution is called when publication is given to the views of representatives or organisations which resort to violence against the State. Such interviews hold the risk that the media become a vehicle for the dissemination of hate speech and the promotion of violence.

After a thorough examination of the wording and the content of the litigious publications and after considering the context of the political and the security situation in South-east Turkey, the Court in eleven cases comes to the conclusion that the conviction and sentencing of the applicants was not necessary in a democratic society. Accordingly there has been a violation of Article 10 of the Convention. In all of these cases the Court was of the opinion **that the impugned articles, news reporting, books or speeches could not be said to incite to violence.** In most cases, the Court is also struck by the severity of the sanctions imposed (20 month's imprisonment, substantial fines, and seizures of books...): in that connection the nature and severity of the penalties are also factors which lead to the conclusion of disproportionality of the interferences. Specifically in the Sürek n° 2 case the Court underlined that the contested interference related to journalistic reporting of statements made by certain politicians to the press concerning their visit to an area in Turkey where tensions had occurred. Furthermore, as the information in issue, identifying specific police officers with serious misconduct, was also reported in other newspapers, there was no real need to prosecute the publication of this information anymore. The Court in this case considered that the conviction and sentence of Mr. Sürek were capable of discouraging the contribution of the press to open discussion on matters of public concern.
In most of the cases the Court also has found a violation of Article 6 of the Convention. The applicants had been denied the right to have their cases heard before an independent and impartial tribunal as the National Security Court, in which one of the bench of three judges was a military judge, had tried them.

In the case of Sürek n° 1 and Sürek n° 3 the Court found no violation of Article 10 of the Convention. The Court is of the opinion that the impugned letters and the news commen-

tary must be seen as capable of inciting to further violence in the region. Hence the conviction of Sürek could be regarded as answering a "pressing social need". The Court is of the opinion that what is in issue in these two cases is "hate speech and the glorification of violence" and "incitement to violence".
The two judgments that found no violation of Article 10 are also important from another point of view. It is to be underlined that Sürek was convicted while he was the owner/publisher of the weekly review in which the letters of the readers and the news commentary were published. Although he didn't write the articles personally and even as he had only a commercial and not an editorial relationship with the review, this could not exonerate him from criminal liability. Sürek was the owner and "as such he had the power to shape the editorial direction of the review". The Court held that for that reason Sürek "was vicariously subject to the "duties and responsibilities" which the review's editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension".

12.- Dalban v. Romania, 28 September 1999 (critical reporting on fraud and corruption by politician and business man)

In the case of Dalban v. Romania the Grand Chamber of the Court unanimously reached the conclusion that there has been a violation of the freedom of expression by the Romanian authorities. The case concerns an application by Mr. Ionel Dalban who was a journalist and ran a local weekly magazine, the *Cronica Romascana*. In 1994 Dalban was convicted for criminal libel because of some articles that exposed a series of frauds allegedly committed by a senator (R.T.) and the chief executive (G.S.) of a State-owned agricultural company, Fastrom/State Farm. Dalban died on 13 March 1998. His widow continued the proceedings in Strasbourg in the applicant's stead. In the meantime, on 2 March 1999 the Romanian Supreme Court quashed the conviction of Dalban and acquitted the applicant of the charge of libelling G.S. The proceedings in the case on the charge relating to Senator R.T. were discontinued due to Mr. Dalban's death.

In its judgment of 28 September 1999 the European Court is of the opinion that the applicant's conviction constituted an "interference by public authority" with his right to freedom of expression, without the interference was necessary in a democratic society. The Court underlines that the articles in issue concerned a matter of public interest and that the press has to fulfil an essential function in a democratic society. **According to the Court there is no proof that the description of events given in the articles was totally untrue. It is also emphasised that Dalban did not write about aspects of private life about senator R.T., but about his behaviour and attitudes in his capacity as an elected representative of the people.** The European Court cannot agree with the Romanian courts that the fact that there hasn't been a court case against R.T. or G.S. was sufficient to establish that the information contained in Dalban's articles was false. The Court reached the conclusion that the applicant's conviction of a criminal offence and the sentencing to imprisonment amounted to a disproportionate interference with the exercise of his freedom of expression as a journalist.

(See also Constantinescu v. Romania, 27 June 2000 and Busuioc v. Moldova, 21 December 2004)

13.- News Verlags GmbH & CoKG v. Austria, 11 January 2000 (the publication of photographs of a suspect without his consent, defamation, presumption of innocence)

This case concerns an injunction order by the Vienna Court of Appeal prohibiting the magazine *News* to publish photographs of a person (B.) in the context of its court reporting. B. was suspected to be responsible for a letter-bomb campaign in 1993. According to the Court **the prohibition to publish such photos in connection with reports on the criminal proceedings is to be considered as interference in the applicant's freedom of expression and information**. The Court agrees that the interference was prescribed by Austrian law and pursued a legitimate aim as the injunction had the aim of protecting the reputation or rights of B. as well as the authority and impartiality of the judiciary. The Court decided however that the injunction order was disproportionate and hence violated article 10 of the Convention.

The Court recalled that "it is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists". Furthermore the media have not

only the right, but even the duty according to the Court to impart - in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public concern, including the reporting and commenting on court proceedings. The Court emphasised that the criminal case on the letter bombs at the time was a news item of major public concern and that B. was arrested as the main suspect. Although the injunction order did in no way restrict the applicant company's right to publish comments on the criminal proceedings against B, it is underlined however that it restricted the applicant company's choice as to the presentation of its report, while it was undisputed that other media were free to continue to publish B's picture throughout the criminal proceedings against him. **An absolute prohibition to publish pictures of B. in the press reports of the magazine News is considered by the Court as a disproportionate measure. As the Court underlines**: "The absolute prohibition of the publication of B's picture went further than was necessary to protect B. against defamation or against violations of the presumption of innocence". It followed from these considerations by the Court that the interference with the applicant company's right to freedom of expression was not "necessary in a democratic society" and accordingly violated Article 10 of the Convention.

(See also Krone Verlag & Co v. Austria, 26 February 2002 and Scharsach and News Verlagsgesellschaft v. Austria, 13 November 2003).

14.- Fuentes Bobo v. Spain, 29 February 2000 (freedom of expression of civil servant, employee, criticising the management/employer, horizontal effect)

In this case the Court reached the conclusion that the dismissal of an employee of the public broadcasting organisation *TVE* was to be considered as a violation of the freedom of expression. In 1993 Fuentes Bobo co-authored an article in the newspaper *Diario* criticising certain management's action within the Spanish public broadcasting organisation. Later in two radio programmes Fuentes Bobo made critical remarks about some TVE-managers. These remarks led to disciplinary proceedings that ended with the applicant's dismissal in 1994.

In its judgment of 29 February 2000 the Court was of the opinion that the dismissal of the applicant due to certain offensive statements was to be considered as interference by the Spanish authorities in the applicant's freedom of expression. The Court pointed out that **Article 10 of the Convention is also applicable in relations between employer and employee and that the State has positive obligations in certain cases to protect the right of freedom of expression against interference by private persons. Although the interference was prescribed by law and was legitimate in order to protect the reputation or rights of others, the Court could not agree that the severe penalty imposed on the applicant met a "pressing social need"**. The Court underlined that the criticism by the applicant had been formulated in the context of a labour dispute within *TVE* and was to be situated in a public discussion on the failings of public broadcasting in Spain at the material time. The Court also took into consideration that the offensive remarks attributed to the applicant appeared more or less to have been provoked during lively and spontaneous radio-shows in which he participated. As no other legal action was undertaken against the applicant because of the "offensive" statements and because of the very severe character of the disciplinary sanction the Court finally came to the conclusion that the dismissal of Fuentes Bobo was to be considered as a violation of Article 10 of the Convention.

(See also De Diego Nafria v. Spain, 14 March 2002).

15.- Özgür Gündem v. Turkey, 16 March 2000 (freedom of the press, duty of authorities to protect journalists against violent attacks, positive obligation)

In the case of *Özgür Gündem* v. Turkey the European Court once more held that there has been a violation of Article 10 of the Convention by the Turkish authorities. *Özgür Gündem* was a daily newspaper published in Istanbul in the period 1992-1994, reflecting Turkish Kurdish opinion. After a campaign that involved killings, disappearances, injuries, prosecutions, seizures and confiscation, the newspaper ceased publication. The applicants submitted that the State authorities had failed to provide protection of the newspaper and complained of the convictions of its reporting on the Kurdish issue that was estimated as constituting separatist propaganda and provoking racial and regional hatred.

In respect of the allegations of attacks on the newspaper and its journalists, the Court was of the opinion that **the Turkish authorities should have better protected Özgür Gündem**. The Court considered that although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may be positive obligations inherent in an effective respect of the rights concerned. The Court stated that genuine, effective exercise of the freedom of expression "does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals". In the case of *Özgür Gündem* the Turkish authorities have not only failed in their positive obligation to protect the freedom of expression of the applicants.

According to the Court the search operations, prosecutions and convictions for the reporting on the Kurdish problem and for criticising the government policy violated Article 10 as well. The Court underlined that **the authorities of a democratic State must tolerate criticism, even if it may be regarded provocative or insulting**. The judgment also emphasised that the public enjoys the right to be informed of different perspectives on the situation in south-east Turkey, irrespective of how unpalatable those perspectives appear to the authorities. An important element was also that the reporting by *Özgür Gündem* was **not to be considered as advocating or inciting to the use of violence**. The Court held unanimously that there has been a breach of Article 10 of the Convention.

16.- Thoma v. Luxembourg, 29 March 2001 (criticising civil servants, burden of proof, quotation from a newspaper)

Marc Thoma, a radio journalist working for *RTL (Luxembourg radio and television)*, alleged that a civil conviction because of a defamatory statement in a radio programme violated his right to freedom of expression. In that radio programme he reported on alleged fraud mechanisms in the field of reforestation work. These allegations were based on an article published in the newspaper *Tageblatt*. On request of 63 Forestry Commission officials the journalist was convicted by the Luxembourg's courts because of defamatory statements.

The European Court of Human Rights held unanimously that there has been a violation of Article 10 of the Convention. The Court reminded its general principles, emphasising the important role of the press in a democratic society. Although the European Court recognised that some of the applicant's remarks were very serious and that the officials of the Water and Forestry Commission were indirectly identifiable, it noted at the same time that the issue raised in the radio programme had been widely debated in the Luxembourg media and concerned a problem of **public interest**. Particularly the fact that Thoma had based his defamatory remarks on an article published by a fellow journalist, was a decisive element in this case. The European Court reiterated that punishing a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there were particularly strong reasons for doing so. The Luxembourg court had decided that a journalist who merely quoted from an article that had already been published would only escape liability if he formally distanced himself from that article. **The European Court however is of the opinion that such a requirement for journalists to distance themselves systematically and formally from the content of a quotation that might defame or harm a third party was not reconcilable with the press's role of providing information on current events, opinions and ideas.** The Court noted that the applicant had taken the precaution of mentioning that he was quoting from a press article and that he had underlined that this article contained some "strongly worded" allegations. The Court also took into consideration the fact that the journalist had interviewed a third party, a woodlands owner, whether he thought that the allegations of fraud in the sector of reforestation were true. Under these circumstances the Court was not sufficiently convinced that the conviction of the applicant was necessary in a democratic society to protect the reputation and the rights of others.

(See also Radio France v. France, 30 March 2004)

17.- Feldek v. Slovakia, 12 July 2001 (Criticising a politician because of his "fascist past")

In this judgment the European Court of Human Rights has decided, by five votes to two, that there has been a violation of Article 10 because of

the conviction of a publicist who had sharply criticised the Slovak Minister of Culture and Education. It was the second time in only a short period that the Strasbourg Court has found a breach of the freedom of expression in Slovakia (ECtHR 19 April 2001, Appl. 32686/96, Marônek v. Slovakia).

In 1995 after the publication of a statement in several newspapers referring to the "fascist past" of the Minister of Culture and Education of the Slovak Republic, the author of this statement, Mr. Feldek was convicted by the Supreme Court. The Court applied the Articles 11 and 13 of the Slovak Civil Code, giving protection against unjustified infringement of one's personal rights, civil and human dignity. The statement indeed was considered as having a defamatory character and Feldek was ordered to endure the publication of the final judgment in five newspapers.

In its judgment of 12 July 2001 the European Court of Human Rights recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest and that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Emphasising **the promotion of free political debate as a very important feature in a democratic society the Court underlined that allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general.** In the Feldek case, the Court is satisfied that the value judgment referring to the "fascist past" of the Slovak Minister of Culture was based on information which was already known to the wider public. The Strasbourg Court refuses to subscribe to a restrictive definition of the term "fascist past", as such a reference can also mean that a person participated in a fascist organisation, as a member, even if it was not coupled with specific activities propagating fascist ideals. The Human Rights Court reaches the conclusion that the Slovakian courts did not convincingly establish any pressing social need for putting the protection of the personal right of a public figure above the applicant's right to freedom of expression and the general interest of promoting this freedom when issues of public interest are concerned. As the interference complained of by Feldek was not necessary in a democratic society, the Court found that there has been a violation of Article 10 of the Convention.

(See also Hrico v. Slovakia, 20 July 2004)

18.- Ekin v. France, 17 July 2001 (prohibition of distribution of a book, discrimination, freedom of expression regardless of frontiers)

In a judgment of 17 July 2001 the European Court of Human Rights has analysed Section 14 of the French Act on the Freedom of the Press from the scope of Article 10 and 14 of the European Convention. This provision empowers the Minister of the Interior to impose a ban on the circulation or distribution of foreign publications. The Court noted that Section 14 of the law of 1881 did not state the circumstances in which the power could be used. In particular, there was no definition of the concept of "foreign origin" and no indication of the grounds on which a publication could be banned. With regard to the banning in 1987 of the book "Euskadi at war" published by the Basque cultural organisation Ekin, the Court was of the opinion that the applicant had not been in the possibility to rely on an effective judicial review to prevent abuse of Section 14 of the French Press Act. According to the Court this provision appeared also to be in direct conflict with the actual wording of Article 10 § 1 of the Convention, which provides that the rights recognised in that Article subsist "regardless of frontiers". According to the Court **a system of control on publications merely based on their foreign origin is indeed to be considered as a kind of discrimination**. Finally the Court held that the content of the book did not justify so serious an interference with the applicant's freedom of expression as that constituted by the ban imposed by the French Minister of the Interior. Besides the violation of Article 10 of the Convention, the Court also noted that the total length of the proceedings, more than nine years, could not be considered "reasonable", although the issue of the litigation was of particular importance (violation of Article 6 § 1 of the Convention).

19.- E.K. v. Turkey, 7 February 2002 (advocacy of human rights' protection, criticising the government, separatist propaganda)

In 1994 E.K., the secretary of the Istanbul section of the Human-Rights Association, was convicted in two separate judgments by the State Security Court finding that she had expressed support for the activities by the PKK and that she had undermined territorial integrity and unity of the Turkish Nation. The first conviction was related to an article by E.K. published in the Istanbul daily newspaper *Özgür Gündem* under the title "The

world owes a debt to the Kurdish people". The article contained the text of a lecture by E.K. on a conference held in the Belgian Parliament. The article criticised the repressive approach of the Turkish policy in Kurdistan and the violation of human rights by the Turkish army. The second case concerned an article in a book that was edited by E.K. The article described the situation in Turkish prisons. The State Security Court sentenced E.K. to two years' and six months' imprisonment and convicted her to substantial fines.

The applicant complained that her conviction in relation to the publication of the book constituted a violation of Article 7 (no punishment without law) and that both convictions infringed Article 10 (freedom of expression) and Article 6 (fair trial) of the European Convention on Human Rights and Fundamental Freedoms.

The Court unanimously declared the conviction in relation to the publication of the book as an infringement of Article 7 of the Convention, as indeed according to Turkish law prison sentences could be imposed only on editors of periodicals, newspapers and magazines and not books. The Court also unanimously declared that both convictions were a breach of Article 10 of the Convention. The conviction in relation to the publication of the book applied a law, which was no longer applicable at the time of the conviction by the State Security Court. Hence this interference by the Turkish public authorities was considered not to be prescribed by law. In more general and principle terms the Court also found a breach of Article 10, as the Court emphasised once more the importance of freedom of expression, the role of the press in a genuine democracy and the right of the public to be properly informed. According to the Court the impugned article published in *Özgür Gündem* **indeed sharply criticised the Turkish authorities, but it did not contain any incitement to violence, hostility or hatred between citizens**. The conviction of the applicant as editor of the book was neither to be considered as "necessary in a democratic society". The Court emphasised that the impugned article was rather to be considered as a profound protest referring to a difficult political situation, and not as an incitement to an armed struggle.

(See also Emire Eren Keskin v. Turkey, 22 November 2005 and Erbakan v. Turkey, 6 July 2006)

20.- Gaweda v. Poland, 14 March 2002 (registration of periodical, not "prescribed by law", ambiguous and unclear criteria)

In 1993 and 1994, Mr. Gaweda was refused the registration of two periodicals by the Polish authorities. The first periodical was titled *"The Social and Political Monthly – A European Moral Tribunal"*, while the second request concerned the registration of a periodical under the title *"Germany – a Thousand year old Enemy of Poland"*. Both requests for registration were dismissed by the Polish courts, considering that the name of a periodical should be relevant to its content in application of the 1984 Press Act and the Ordinance of the Minister of Justice on the registration of periodicals. With regard to the first periodical the Polish courts were of the opinion that the name proposed implied that a European institution was supporting or publishing the magazine, which was untrue and misleading. With regard to the second title the courts considered that the title was in conflict with reality as well, in that it unduly concentrated on negative aspects of Polish-German relations, thus giving an unbalanced picture of the facts.

In a judgment of 14 March 2002 the European Court of Human Rights reached the conclusion that both refusals to register the title of a periodical magazine were violating the applicant's freedom of expression as guaranteed by the European Convention on Human Rights. **The European Court does not consider the obligation to register a title of a newspaper or a magazine *as such* as a violation of Article 10 of the Convention.** But as the refusal of the registration amounted to an interference with the applicant's right of expression, this refusal must be in accordance with Article 10 § 2 of the Convention, which means in the first place that this interference in the freedom of expression of the applicant must be "prescribed by law". Referring to Article 20 of the Press Act and Article 5 of the Ordinance on the registration of periodicals, the Court is of the opinion that the **applicable law was not formulated with sufficient precision, as the terms used in the Law and in the Ordinance are ambiguous and lack the clarity that one would expect in a legal provision of this nature**. According to the Court the legal provisions rather suggest that registration can be refused where the request for registration did not conform to the technical details specified in Article 20 of the Press Act. The refusal of a registration because of the alleged misleading title is to

be considered as "inappropriate from the standpoint of freedom of the press". The European Court also observed that in the present case the domestic courts have imposed a kind of prior restraint on a printed media in a manner which entailed a ban on a publication of entire periodicals on the basis of their titles. Such an interference would at least require a legislative provision which clearly authorised the courts to do so. According to the European Court the interpretation given by the Polish courts to Article 5 of the Ordinance introduced new criteria, which could not be foreseen on the basis of the text specifying situations in which the registration of a title can be refused. Therefore the Court was of the opinion that the manner in which the interference in the applicant's exercise of his freedom of expression was not "prescribed by law" within the meaning of Article 10 § 2 of the Convention. Accordingly, the Court unanimously concluded that there has been a violation of Article 10 of the Convention.

21.- Nikula v. Finland, 21 March 2002 (defamation, freedom of expression of lawyer, criticising the public prosecutor)

In 1996 Anne Nikula, a lawyer living in Helsinki, lodged an application against Finland alleging that her freedom of expression had been violated on account of her having been convicted of defamation for having criticised, in her capacity as defence counsel, the public prosecutor. In a memorial that the applicant read out before the court in a pending case, the public prosecutor, Mr. T. had been criticised because of "role manipulation and unlawful presentation of evidence". After a private prosecution initiated by Mr. T., Nikula was convicted of public defamation committed without better knowledge. After judgment by the Supreme Court the criminal conviction was confirmed while the sanction was restricted to pay damages and costs.

In its judgment of 21 March 2002 the Court reiterates that **the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the court. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to maintain public confidence in the administration of justice**. The Court refers however also to the possibility that an interference with the counsel's freedom of expression in the course of a trial could also raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial. According to the Court the equality of arms principle and more generally the fair trial principle militates in favour of a free and even forceful argument between the parties, although this should not lead to an unlimited freedom of expression of a defence counsel. In evaluating the legitimate character of the applicant's conviction the Court, referring to the *Interights Amicus Curiae report,* reiterates the distinction between the role of the prosecutor as the opponent of the accused, and that of the judge. This should provide an increased protection for statements whereby an accused criticises a prosecutor, as opposed to verbally attacking the judge or the court as a whole. The Court also noted that the applicant's submissions were confined to the courtroom, as opposed to criticism against a judge or prosecutor voiced in the media. According to the Court "it is only in exceptional cases that restriction - even by way of a lenient criminal sanction - of defence counsel's freedom of expression can be accepted as necessary in a democratic society ". The Court held, by five votes to two, that there has been a violation of Article 10 of the Convention.

(See also Steur v. Netherlands, 28 October 2003; Kyprianou v. Cyprus, 27 January 2004 and (Grand Chamber) 15 December 2005; Veraart t. The Netherlands, 30 November 2006).

22.- Three cases v. Austria, 26 February 2002 (defamation, political speech, value judgments and fair comment)

In three judgments of 26 February 2002, all against Austria, the Court has found a breach of Article 10 of the European Convention. The first case (*Unabhängige Initiative Informationsvielfalt v. Austria*) concerns the publication in the periodical *"TATblatt"* of a leaflet referring to the "racist agitation" by the Austrian Freedom Party FPÖ. The text criticised the racist policy proposals of the FPÖ and was followed by a list of address and telephone numbers of FPÖ members and offices with an invitation to the readers of *"TATblatt"* to call the FPÖ politicians and tell them what they think of them and their policy. The Austrian courts, after civil proceedings initiated by FPÖ leader Jörg Haider, were of the opinion that the statement concerning the racial agitation was to be considered as an insult and went beyond the limits of acceptable criticism by reproaching the plaintiff with a criminal offence. An injunction

not to repeat the statement was granted against the publisher of the magazine. The European Court however in its judgment of 26 February 2002 is of the opinion that the statement is to be situated in the context of a political debate and contributed to a discussion on subject-matters of general interest such as immigration and the legal status of aliens in Austria. The Court did not accept the qualification of the statement on "racist agitation" as an untrue statement of fact and considered the comment as a value judgment, the truth of which is not susceptible of proof. In sum, the Court unanimously concluded that **it could not find sufficient reasons to prevent the publisher from repeating the critical statement in question**. For that reasons the Court held that there has been a violation of Article 10 of the Convention.

In a second case (*Dichand and others v. Austria)* the Austrian courts had ordered to retract and not repeat some critical statements published in the *Neue Kronen Zeitung*. These statements criticised firmly the strategies and interest of a politician-lawyer, Mr. Graff, defending another media group. Again the European Courts dissented with the Austrian courts: according to the European Court the impugned statements were **value judgments that had an adequate factual basis and represented a fair comment on issues of general public interest**. The Court accepted the criticism against Mr. Graff, as a politician who was in a situation where his business and political activities overlapped. It is recognised by the Court that the statement contained harsh criticism in strong polemical language. However, the Court remembered on it's standard jurisprudence that Article 10 also protects information and ideas that offend, shock or disturb. Unanimously the Court came to the conclusion that the interference by the Austrian authorities violated Article 10 of the Convention.

In the third case (*Krone verlag GMBH & CO. KG v. Austria)* the European Court of Human Rights found that the Austrian courts failed to take into account the essential function the press full fills in a democratic society and its duty to impart information and ideas on matters of public interest. The case concerned the publication of an article, accompanied by **photographs of a politician** who allegedly had received unlawful salaries. A permanent injunction order was granted by an Austrian court prohibiting the applicant company to publish the politician's picture in connection with the article in question or similar articles. According to the Strasbourg Court there was no valid reason why the newspaper should have been prevented from publishing the picture, especially as the **photographs did not disclose any details of the private life of the politician concerned.** The Court also referred to the fact that the picture of the politician as a member of the Austrian Parliament was included on the Austrian Parliament's internet site. The interference with the newspaper's right to freedom of expression was therefore not necessary in a democratic society. Accordingly, the Court unanimously held that there has been a violation of Article 10 of the Convention.

(See also Scharsach and News Verlagsgesellschaft mbH v. Austria, 13 November 2003)

23.- Mc Vicar v. the United Kingdom, 7 May 2002 (defamation, burden of proof, "circumstantial evidence" is not a reliable basis for the litigious allegations)

In September 1995 an article was published in the magazine *Spiked* in which the journalist John McVicar suggested that the athlete Linford Christie used banned performance-enhancing drugs. Mr. Christie brought an action in the High Court for defamation against McVicar. During the greater part of the proceedings McVicar represented himself, as he could not afford to pay legal fees because legal aid was not available for defamation actions. His defence was that the allegations made in the article were true in substance and in fact. The trial judge however refused to admit the evidence of two witnesses McVicar wished to rely on. The judge found that allowing both witnesses would have been unfair to Mr. Christie, without giving Mr. Christie time to call counter-evidence and because Mr. Christie would only be confronted with details about his alleged drug-taking until the witness took the stand. In 1998 the jury found that the article contained defamatory allegations and found that McVicar had not proved that the article was substantially true. McVicar was ordered to pay costs and was made subject to an injunction preventing him from repeating the allegations.

McVicar lodged an application with the European Court alleging that the inability of a defendant to a libel action to claim legal aid constituted a violation of Article 6 § 1 (fair trial) and 10 (freedom of expression and information) of the Convention. He also submitted that the exclusion of witness evidence at a trial, as well as the burden of

proof which he faced in pleading a defence of justification, the order for costs and the injunction restricting future publication further violated Article 10 of the Convention.

The European Court is of the opinion that McVicar was not prevented from presenting his defence to the defamation action effectively in the High Court, nor were the proceedings unfair by reason of his ineligibility for legal aid. The Court inter alia noted that the applicant was a well-educated and experienced journalist who would have been capable of formulating a cogent argument before the Court. Therefore, there had been no violation of Article 6 or Article 10 of the Convention.

As for the exclusion of evidence, the order to pay the costs in relation to the defamation proceedings and the injunction measure, the Court held that there was no violation of Article 10 either. The Court considered that **the potential consequences of the allegations made in the article for an individual who had achieved fame and fortune purely as a result of his athletic achievements were very grave**. The Court also emphasised that the **offending article in itself made no mention of any authoritative basis for the drug-taking allegation**. For that reasons the Court held unanimously that there has been **no violation of Article 10** of the Convention either.

(See also Constantinescu v. Romania, 27 June 2000; Wierzbicki v. Poland, 18 June 2002, Lešnik v. Slovenia, 11 March 2003; Chauvy and others v. France, 29 June 2004 and Stângu and Scutelnicu v. Romania, 31 January 2006)

24.- Colombani (Le Monde) v. France, 25 June 2002 (insult, matter of public interest, official document, no privilege for head of foreign state with regard protection of reputation)

This case concerns the conviction of the publishing director and a journalist of the newspaper *Le Monde*. Both had been convicted by the Court of Appeal of Paris in 1997 because of defamation of the King of Morocco, Hassan II.

In its issue of 3 November 1995 the newspaper *Le Monde* published a confidential version of a report by the Geopolitical Drugs Observatory (OGD) on drug production and trafficking in Morocco. The report had been compiled at the request of the Commission of the European Communities. The article that was headed "A confidential report casts doubt on King Hassan's II entourage", questioned the avowed determination of the Moroccan authorities, and principally the King, to combat the increase in drug-trafficking on Moroccan soil. On request of the Moroccan King criminal proceedings were brought against the newspaper *Le Monde*. Mr. Colombani, the publishing director, and Mr. Incyan, the journalist who wrote the article, were convicted by the Paris Court of Appeal in application of section 36 of the Law of 29 July 1881 for insulting a foreign head of state. According to the Court the journalist had failed to check the allegations and the article was considered to have been inspired with malicious intent.

The European Court however does not agree with these findings, emphasizing in the first place that **when contributing to a public debate on issues that raised legitimate concerns the press had in principle to be able to rely on official reports without being required to carry out its own separate investigations**. The Strasbourg Court also referred to other French case law inclining to recognise that the offence under section 36 of the Law of 29 July 1881 infringed freedom of expression as guaranteed by Article 10 of the Convention. Recent French jurisprudence itself appeared to accept that this incrimination and its application was not necessary in a democratic society, particularly since heads of state or ordinary citizens against whom insulting remarks had been made or whose honour or reputation had been damaged had a sufficient criminal remedy in the form of a prosecution for defamation. The **special status for heads of states** that derogated from the general law could not be reconciled with modern practice and political conceptions. In the Court's view, **such a privilege went beyond what was necessary in a democratic society.** The Court consequently found that, because of the special nature of the protection afforded by the relevant provision of the Law of the Freedom of the Press of 1881, the offence of insulting foreign heads of state was liable to infringe freedom of expression without meeting a "pressing social need". For that reasons the Court held unanimously that there has been a violation of Article 10 of the Convention.

(See also Gutiérrez Suárez v. Spain, 1 June 2010)

25.- Wilson & National Union of Journalist (and others) v. the United Kingdom, 2 July 2002 (collective bargaining, union membership, financial incentives and freedom of association)

In a judgment of 2 July 2002 the European Court of Human Rights has found a violation by the United Kingdom on the freedom of assembly and association (article 11 of the European Convention). The case concerns the use of financial incentives to induce employees to surrender the right to union representation for collective bargaining. The case is especially interesting for the media sector, as this case was brought before the Court of Human Rights jointly by David Wilson, a journalist working for the *Daily Mail* and by the National Union of Journalists (NUJ). Other applications by members of the National Union of Rail, Maritime and Transport Workers later were joined to this initial application by Wilson and the NUJ.

The case goes back to 1989 when the Associated Newspapers Limited gave notice that it intended to de-recognise the NUJ and terminate all aspects of collective bargaining and that personal contracts were to be introduced with a 4,5% pay increase for journalists who signed and accepted the de-recognition. Wilson applied to domestic courts complaining that the requirement to sign the personal contract and lose union rights, or accept a lower pay rise, were illegal. After the House of Lords held that the collective bargaining over employment terms and conditions was not a defining characteristic of union membership, Wilson and NUJ lodged applications in Strasbourg, alleging that the law of the United Kingdom, by allowing the employer to de-recognise trade unions, failed to ensure their right to protect their interest trough trade union and to freedom of expression contrary to Articles 11 and 10, also in conjunction with Article 14 of the Convention (non-discrimination).

With regard to Article 11 the Court is of the opinion that the absence in the United Kingdom law of an obligation on employers to enter to collective bargaining gave no rise, in itself, to a violation of Article 11 of the Convention. However, the Court found that **permitting employers to use financial incentives to induce employees to surrender important union rights amounted to a violation of Article 11**. The Court referred to the fact that this aspect of domestic law has been the subject of criticism by the Social Charter's Committee of Independent Experts and the International Labour Organisation's Committee of Freedom of Association. According to the Court, **it is the role of the State to ensure that trade union members were not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers**. The Court concluded that the United Kingdom had failed in its positive obligation to secure the enjoyment or the rights under Article 11 of the Convention.

As the Court did not consider that any separate issue arose under Article 10 that had not already been dealt with in the context of Article 11 of the Convention, the Court held that it was not necessary to examine the complaint from the perspective of Article 10 of the Convention. The Court also found that it was unnecessary to consider the complaint raised under article 14 of the Convention.

26.- Stambuk v. Germany, 17 October 2002 ("commercial speech", freedom of expression of doctor, advertising or interview, disciplinary sanction)

In a judgment of 17 October 2002 the European Court came to the conclusion that a disciplinary punishment of a doctor for disregarding the ban on advertising by giving an interview in the press, was to be considered as a breach of Article 10 of the Convention. In 1995, the applicant, an ophthalmologist, was imposed a fine by a district Disciplinary Court for Medical Practitioners. An article in a newspaper, with an interview and a photograph of Mr. Stambuk was considered as disregarding the ban on advertising for medical practitioners. The interview in which Mr. Stambuk explained the successful treatment with a new laser technique that he applied, was seen as a kind of self-promotion, in breach of the Rules of Professional Conduct of the Medical Practitioners' Council. According to section 25(2) of this Code a medical practitioner should not allow for picture-stories to be published in respect of professional activities, which had an advertising character, indicated the name and showed a photograph. According to section 27 the cooperation of a medical practitioner in informative publications in the press was only permissible if these publications were limited to objective information, without the practitioner was presented in the form of an advertisement. The Disciplinary Appeals Court confirmed the sanction, taking into regard that Mr. Stambuk had not only tolerated than an article was published which would

go beyond objective information on a particular operation technique, but had deliberately acted so as to give prominence to his own person.

The European Court of Human Rights recognises that restrictions on advertising by medical practitioners in the exercise of their liberal profession have a legitimate aim in protecting the rights of others or to protect health. The question however if *in casu* a disciplinary punishment was necessary in a democratic society, is answered negative by the European Court. The Court recalls that, for the citizen, advertising is a means of discovering the characteristics of services and goods offered to him. The Court recognises that owing to the special circumstances of particular business activities and professions, advertising or commercial speech may be restricted. The Court also accepts that **the general professional obligation of medical practitioners to care of the health of each individual and of the community as a whole may indeed explain restrictions on their conduct, including rules of their public communication or participation in public communications on professional issues**. These rules of conduct in relation to the press is to be balanced however against the legitimate interest of the public in information and are limited to preserve the well-functioning of the profession as a whole. They should not be interpreted as putting an **excessive burden on medical practitioners to control the content of press publications,** taking also into regard the essential function fulfilled by the press in a democratic society by imparting information and ideas on all matters of public interest. According to the Court, the article with the interview and a photo with Mr. Stambuk on the whole presented a balanced explanation of the specific operation technique, inevitably referring to the applicant's own experience. **The article may well have had the effect of giving publicity to Mr. Stambuk and his practice, but, having regard to the principal content of the article, this effect proved to be a secondary nature**. According to the European Court the interference complained of by Mr. Stambuk did not achieve a fair balance between the interests at stake, namely the protection of health and the interests of other medical practitioners and Mr. Stambuk's right to freedom of expression and the vital role of the press. In sum, there has been a breach of Article 10 of the Convention.

27.- Demuth v. Switzerland, 5 November 2002 (refusal to grant a broadcasting licence, margin of appreciation, broadcasting policy)

In 1997 Mr. Demuth complained before the European Court of Human Rights that the decision of the Swiss Federal Council (*Bundesrat*) refusing to grant CAR TV AG a broadcasting licence for cable TV, ran counter to Article 10 of the Convention (freedom of expression). He considered that the refusal was arbitrary and discriminatory. In a decision of 16 June 1996 the Federal Council had decided that there was no right, either under Swiss law or Article 10 of the European Convention, to obtain a broadcasting licence. With reference to the instructions for radio and television listed in Section 3 § 1 and Section 11 § 1 (a) of the Radio and Television Act (*Bundesgezetz über Radio und Fernsehen*, RTA), the Federal Council was of the opinion that the orientation of the program of CAR TV AG was not able to offer the required valuable orientation to comply with the general instructions for radio and television, as the program focused mainly on entertainment and reports about automobile.

In its judgment of 5 November 2002 the European Court confirms its former case law that the refusal to grant a broadcasting licence is to be considered as an interference with the exercise of the freedom of expression, namely the right to impart information and ideas under Article 10 § 1 of the Convention. The question is if such an interference is legitimate. According to the third sentence of Article 10 § 1 the member states are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It remains however to be determined whether the manner in which the licensing system is applied satisfies the relevant conditions of paragraph 2 of Article 10. The Court is of the opinion that the relevant provisions of the licensing system of the RTA were capable of contributing to **the quality and balance of programs**. This is considered a sufficient legitimate aim, albeit not directly corresponding to any of the aims set out in Article 10 § 2. The Court also refers to **the particular political and cultural structure in Switzerland, that necessitate the application of sensitive political criteria such as cultural and linguistic pluralism and a balanced federal policy**. The Court sees no reason to doubt the validity of these considerations, which are of considerable importance for a federal State. Such factors, encouraging in particular

pluralism in broadcasting may legitimately be taken into account when authorising radio and television broadcasts. The Court comes to the conclusion that the Swiss Federal Council's decision, guided by the policy that television programs shall to a certain extent also serve public service, did not go beyond the margin of appreciation left to national authorities in such matters. The Court also observes that the refusal to grant the requested licence was not categorical and did not exclude a broadcasting licence once and for all. Although the Court explicitly recognizes that opinions may differ as to whether the Federal Council's decision was appropriate and whether the broadcasts should have been authorised in the form in which the request was presented, the Court reaches the conclusion that the restriction of the applicant's freedom of expression was necessary in a democratic society. The Court especially takes note of the Government's assurance that a licence would indeed be granted to CAR TV AG if it included cultural elements in its program. The Court considered it unnecessary to examine the Government's further ground of justification, contested by the applicant, for refusing the licence, namely that there were only a limited number of frequencies available on cable television. By 6 votes to 1, the Court reaches the conclusion that there has been **no violation of Article 10** of the Convention.

28.- A. v. the United Kingdom, 17 December 2002 (freedom of speech by member of parliament, privilege, privacy, forum for political debate)

Although the case of A. v. United Kingdom is not an Article 10 case, the judgment of the European Court of Human Rights of 17 December 2002 is to be considered as an important confirmation of the principle of freedom of speech and political debate. The case concerns the question whether the statements of an MP in the House of Commons were protected by the parliamentary privilege under Article 9 of the Bill of Rights 1689. During a parliamentary debate on housing policy in 1996, a member of Parliament made offending and derogatory remarks about the behaviour of A. and her children. The MP called the family of A. "neighbours form hell", a phrase which was also quoted in the newspapers. Following the MP's speech and the hostile wordings in the press A. received hate-mail addressed at her and she was also stopped in the street and abused by offending language. A. was re-housed by the housing association as a matter of urgency and her children were obliged to change school. A complaining letter to the MP that was forwarded to the Office of the Parliamentary Speaker and a letter to the then Prime Minister, Mr. John Major, stayed without effect. A. was informed about the absolute character of the parliamentary privilege.

In Strasbourg the applicant complained that the absolute nature of the privilege which protected the MP's statements about her in Parliament especially violated her right of access to court under Article 6 § 1 of the Convention. The European Court of Human Rights recognises the legitimate aim of **protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary**. The Court emphasized that in a democracy, Parliament or such comparable bodies are the essential fora for a political debate. The Court is of the opinion that the absolute immunity enjoyed by MPs is designed to protect the interests of Parliament as a whole as opposed to those of individual MPs: "In all the circumstances of this case, the application of a rule of absolute Parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to court". The Court emphasized however that **no immunity attaches to statements outside Parliament, nor does any immunity attach to an MP's press statements, even if their contents repeat the statements during the parliamentary debate itself**. The Court agrees with the applicant's submissions to the effect that the allegations made about her in the MP's speech were extremely serious and clearly unnecessary in the context of a debate about municipal housing policy. The MP's repeated reference to the applicant's name and address was particularly regrettable. The Court considers that the unfortunate consequences of the MP's comments for the lives of the applicant and her children were entirely foreseeable. However, these factors cannot alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue. There has, accordingly, been no violation of Article 6 § 1 of the Convention as regards the parliamentary immunity enjoyed by the MP. The absence of legal aid for defamation proceedings in the United Kingdom was neither estimated as a violation of Article 6 § 1 of the Convention. The applicant was considered to have had sufficient possibilities to bring defamation proceedings in respect of the unprivileged press releases.

The Court also took into consideration the domestic law of the eight States to have made a third-party intervention. Each of these laws make provision for such an immunity, although the precise detail of the immunities concerned varies. The Court believes that the rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within the signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. The Court found neither a violation of Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) nor Article 14 (prohibition of discrimination).

(See also Jerusalem v. Austria, 27 February 2001; Cordova no. 1 and no. 2 v. Italy, 30 January 2003 and De Jorio v. Italy, 3 June 2004. Compare with : G.C.I.L and Cofferati v. Italy, 24 February 2009 and G.C.I.L and Cofferati (no. 2) v. Italy, 6 April 2010)

29.- Peck v. the United Kingdom, 28 January 2003 (release and broadcasting of footage of CCTV system infringes right of privacy, self-regulation and co regulation without sanctions is no effective legal remedy)

In the case of Peck v. the United Kingdom the applicant complained about the disclosure to the media of a closed circuit television (CCTV) footage, which resulted in images of himself being published and broadcasted widely. The CCTV's Council had released images to the media with the aim of promoting the effectiveness of the CCTV system in the detection and the prevention of crime. Extracts of the footage *inter alia* were included in an *Anglia Television* news programme and in the *BBC* program "Crime Beat". The masking was considered inadequate by the ITC (Independent Television Commission) and the BSC (Broadcasting Standards Commission) as neighbours, colleagues, friends and family who saw the programmes recognised the applicant. The judicial authorities in the United Kingdom at the other hand did not consider that the disclosure of the CCTV material was a breach or the applicant's right of privacy under Article 8 of the European Convention.

The European Court of Human Rights however is of the opinion that the disclosure of the images to the media resulted in a breach of Article 8 of the Convention. The Court emphasises that the applicant was in a public street but that he was not there for the purposes of participating in any public event, neither that he was a public figure. The image of the applicant was showed in the media, including the audio-visual media of which is "commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media". As a result, the Court considers that the **unforeseen disclosure by the CCTV's Council of the relevant footage constituted a serious interference with the applicant's right to respect for his private life**. The Court also came to the conclusion that the disclosure was not "necessary in a democratic society". Although the Court recognises that the CCTV system plays an important role in detecting and preventing crime and that this role is rendered more effective and successful trough advertising the CCTV system and its benefits, the CCTV's Council had other options available to allow to achieve these objectives. The Council could have taken steps to obtain the applicant's prior consent to disclosure, whether the Council itself could have masked the images before making them available to the media, whether the Council could have taken the utmost care in ensuring that the media to which the disclosure was made, masked the images. The Court notes that the Council did not explore the first and second option and considers that the steps taken in respect of the third option were inadequate. The Court is of the opinion that **the Council should have demanded written undertakings of the media to mask the images, which requirement would have emphasised the need to maintain confidentiality**. As such, the disclosure constituted a disproportionate and therefore unjustified interference with the private life and a violation of Article 8 of the Convention.

With regard the applicant's complaint that he had no effective domestic remedy to have his right of privacy protected in the United Kingdom, it is interesting to underline that the European Court is of the opinion that the power of the BSC and the ITC is not sufficient to consider the procedures before these bodies as an effective remedy, as they cannot make a pecuniary compensation available to an aggrieved individual who may have been injured by an infringement of the relevant broadcasting regulation. Neither did the Court accept the Government's argument that any acknowledgment of the need to have a remedy would undermine the important conflicting rights of the press guaranteed by Article 10 of the Convention, **as the media could have**

achieved their objectives by properly masking of the applicant's identity. Accordingly there has also been a violation of Article 13 of the Convention.

(See also Van Hannover v. Germany, 24 June 2004, on the relation between right to privacy and freedom of expression. See also Sciacca v. Italy, 11 January 2005; Gourguénidze v. Georgia, 17 October 2006; Petrina v. Romania, 14 October 2008; Reklos and Davourlis v. Greece, 15 January 2009; Standard Verlag GmbH (no. 2) v. Austria, 4 June 2009 and Petrenco v. Moldova 30 March 2010)

30.- Perna v. Italy, 6 May 2003 – Grand Chamber (defamation of public prosecutor, burden of proof, lack of evidence)

In a judgment of 6 May 2003 the Grand Chamber of the European Court of Human Rights has overruled the judgment of 25 July 2001 of the Second Section in the case of Perna v. Italy. While the Strasbourg Court in 2001 came to the conclusion that the conviction of the Italian journalist Giancarlo Perna violated Article 10 of the Convention, the Grand Chamber now reached the conclusion that the conviction for defamation was in accordance with the European Convention on Human Rights.

The case goes back to an article published in the newspaper *Il Giornale* in which Perna sharply criticised the communist militancy of a judicial officer, Mr. G. Caselli, at that time the public prosecutor in Palermo. The article raised in substance two separate issues. Firstly, Perna questioned Caselli's independence and impartiality because of his political militancy as a member of the Communist Party. And secondly, Caselli was accused of a strategy of gaining control of the public prosecutors' office and of the manipulative use of a *pentito* against Mr. Andreotti (former Italian prime minister). After a complaint by Caselli, Perna was convicted for defamation in application of Articles 595 and 61 § 10 of the Criminal Code and Section 13 of the Italian Press Act. Trough out the defamation proceedings before the domestic courts, the journalist was refused to admit the evidence he sought to adduce. In 1999 Perna alleged a violation of Article 6 and Article 10 of the European Convention.

The refusal to prove the truth of his statements before the Italian Courts was not considered by the Strasbourg Court as a breach of Article 6 § 1 and 3 (d) of the Convention which guarantees everyone charged with a criminal offence the right to examine or have examined witnesses on his behalf. The Court in its judgment of 25 July 2001 was of the opinion that there were no indications that the evidence concerned could have contributed any new information whatsoever to the proceedings. The Grand Chamber has now confirmed this decision, emphasizing that it was not established that the request of Perna to produce evidence would have been helpful in proving that the specific conduct imputed to Caselli had actually occurred.

With regard to Article 10 of the Convention, the Second Section of the European Court in its judgment of 25 July 2001 has argued that the criticism directed at Caselli had a factual basis which was not disputed, namely Caselli's political militancy as a member of the Communist Party (PCI). The Court agreed that the terms chosen by Perna and the use of the symbolic image of the "oath of obedience" to the Communist Party was hard-hitting, but it also emphasized that journalistic freedom covers possible recourse to a degree of exaggeration or even provocation. According to the Court the conviction of Perna was a violation of Article 10 of the Convention as the punishment of a journalist for such kind of criticism on a member of the judiciary was considered not to be necessary in a democratic society. With regard however to Perna's **speculative allegations about the alleged strategy of gaining control over the public prosecutor's offices in a number of cities** and esp. the (ab)use of the *pentito* Buscetta in order to prosecute Mr. Andreotti, the Court came to the conclusion that the conviction of Perna was not in breach with Article 10 of the Convention.

The Grand Chamber in its judgment of 6 May 2003 however has finally come to the conclusion that the conviction of Perna was not violating Article 10 at all. The Court focuses on the article's overall content and its very essence of which the unambiguous message was that Caselli had knowingly committed an abuse of authority, notably connected with the indictment of Mr. Andreotti, in furtherance of the alleged PCI strategy of gaining control of public prosecutor's offices in Italy. The Court is of the opinion that at no time Perna did try to prove that the specific conduct imputed to Caselli had actually occurred and that in his defence he argued, on the contrary, that he had expressed critical judgments which there was not need to prove. According to the Grand Chamber of the Court, the interference in Perna's freedom of expression could

therefore be regarded as necessary in a democratic society to protect the reputation of others within the meaning of Article 10 § 2 of the Convention.

(See also Rizos and Daskas v. Greece, 27 May 2004)

31.- Murphy v. Ireland, 10 July 2003 (prohibition of religious advertising on Irish broadcasting)

In a judgment of 10 July 2003 the European Court of Human Rights has unanimously held that the applicant's exclusion of broadcasting an advertisement announcing a religious event was considered to be prescribed by law, had a legitimate goal and was necessary in a democratic society. The decision by the Irish Radio and Television Commission (IRTC) to stop the radio broadcast of the advertisement was taken in application of Section 10(3) of the Irish Radio and Television Act, which stipulates that no advertisement shall be broadcasted which is directed towards any religious or political end. The Court accepted that the impugned provision sought to ensure **respect for the religious doctrines and beliefs of others so that the aims of the prohibition were the protection of public order and safety together with the protection of the rights and freedoms of others**. Recognising that a wide margin of appreciation is available to the member states when regulating freedom of expression in the sphere of religion, referring to the fact that religion has been a divisive issue and that religious advertising might be considered offensive and open to the interpretation of proselytism in Ireland, the Court was of the opinion that the prohibition of broadcasting the advertisement was not an irrelevant nor a disproportionate restriction on the applicant's freedom of expression. While there is **not a clear consensus, nor a uniform conception of the legislative regulation of the broadcasting of religious advertising in Europe**, reference is made to the existence in other countries of similar prohibitions on the broadcasting of religious advertising, as well as to Article 12 of the EC-Directive 89/552 of 3 October 1989 according to which television advertising shall not prejudice respect of human dignity nor be offensive to religious or political beliefs. The Court also emphasized that the prohibition concerned only the audio-visual media, having a more immediate, invasive and powerful impact, including on the passive recipient and also the fact that advertising time is purchased and that this would lean in favour of unbalanced usage by religious groups with larger resources and advertising. For the Court it is important that the applicant, a pastor attached to the Irish Faith Centre, a bible based Christian ministry in Dublin, kept to be free to advertise in any of the print media or to participate as any other citizen in programmes on religious matters and to have services of his church broadcast in the audio-visual media. **The Court indeed accepts that a total ban on religious advertising on radio and television is a proportionate measure**: even a limited freedom to advertise would benefit a dominant religion more than those religions with significantly less adherents and resources. This would jar with the objective of promoting neutrality in broadcasting, and in particular, of ensuring a "level playing field" for all religions in the medium considered to have the most powerful impact". The Courts reached the conclusion that the interference in the applicant's freedom of expression was not violating Article 10 of the Convention.

(See also VGT Verein gegen Tierfabriken v. Switzerland, 28 June 2001, "political advertising")

32.- Karkin v. Turkey, 23 September 2003, Kizilyaprak v. Turkey, 2 October 2003 and Zarakolu (nos. 1-3) v. Turkey 2 October 2003 (incitement to separatism, no incitement to violence, freedom of political speech, friendly settlement)

The case of Karkin v. Turkey concerns the conviction of the secretary of a union organisation who has been sentenced by the National Security Board in 1997 to one year's imprisonment for making a speech inciting the people to hatred and hostility creating discrimination based on membership of a social class and race, a criminal conviction in application of Article 312 of the Turkish Criminal Code. Although the Court clearly takes into account the sensitivity of the security situation in south-east Turkey and the need of the authorities to be alert to acts capable of fuelling additional violence in the region, the Court cannot agree that the conviction and punishment of Karkin was to be considered necessary in a democratic society. The Court is of the opinion that the applicant's **speech was "political in nature" and was expressed during a peaceful gathering, far away from the conflict zone**. As this circumstances significantly limited the potential impact of the comments on "national se-

curity", "public order" or "territorial integrity" and as the penalties imposed on the applicant were severe, the Court unanimously concluded that there has been a violation of Article 10 of the Convention.

In the case of Kizilyaprak v. Turkey the European Court of Human Rights is of the opinion that the national authorities had not taken sufficient account of the public's right to be informed form different perspectives on the situation in south-east Turkey. The conviction of Kizilyaprak concerned the publication of a book entitled "How we fought against the Kurdish people! A soldier's memoirs". In this book a Turkish soldier described what he experienced during his military service in south-east Turkey. As the content of the book was considered as disseminating separatist propaganda and incitement to hatred based on ethnical and regional differences (Article 8 of the Prevention of Terrorism Act and Article 312 of the Criminal Code), the owner of the publishing house, Zeynel Abidin Kizilyaprak, was sentenced to six month's imprisonment by the National Security Court in 1993. In a crucial consideration the Strasbourg Court is of the opinion that although some passages in the book painted an extremely negative picture of the Turkish State and the army and reflected a very hostile tone, **the content of the book did not constitute an incitement to violence, armed resistance or an uprising**. Referring also to the severity of the conviction, the Court unanimously concluded that the Turkish authorities have violated Article 10 of the Convention.

In three other cases an agreement was reached between the applicant's widower, Mr. Zarakolu and the Turkish Government. All three cases concern the seizures of several books because of separatist propaganda. The Court in its judgements of 2 October 2003 took notice of the Friendly settlements, referring to the declaration from the Turkish Government in which it is recognised that the (former) Court's rulings against Turkey in cases involving prosecutions under the provisions of the Prevention of Terrorism Act relating to freedom of expression, and also the facts underlying of the presents cases, "show that Turkish law and practice urgently need to be brought into line with the Convention's requirements under Article 10 of the Convention". In all three cases the Court took note of the agreement reached between the parties. The Court expresses its satisfaction that the settlement is based on the respect of human rights as defined in the Convention and its Protocols. The cases are ordered to be struck out of the list.

33.- Müslüm Gündüz v. Turkey, 4 December 2003 (incitement of the people to hatred and hostility on the basis of religion, no incitement to violence, no "hate speech", freedom of religious speech)

In the case of Müslüm Gündüz v. Turkey, the European Court of Human Rights has evaluated the necessity of a criminal conviction because of inciting the people to hatred and hostility. The applicant, in his capacity as the leader of an Islamic sect, during a TV-debate broadcasted by *HBB* channel, has demonstrated a profound dissatisfaction with contemporary, democratic and secular institutions in Turkey by describing them as "impious". During the programme he also openly called for the introduction of the sharia. Due to these statements Müslüm Gündüz was found guilty by the state security court of incitement to hatred and hostility on the basis of a distinction founded on religion. He was sentenced to two years' imprisonment.

In its judgment of 4 December 2003 the European Court of Human Rights comes to the conclusion that this interference by the Turkish authorities with the applicant's right of freedom of expression violated Article 10 of the Convention. Although the applicant's conviction was prescribed by Turkish Criminal Law and had the protection of morals and the rights of others as well as the prevention of disorder or crime as legitimate goals, the Court was not convinced that the punishment of Müslüm Gündüz was to be considered as necessary in a democratic society. The Court observed that the applicant was invited to participate in the programme to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. This topic was the subject of widespread debate in the Turkish media and concerned an issue of general interest. The Court once more emphasised that Article 10 of the Convention also protects information and ideas that shock, offend and disturb. At the same time however **there can be no doubt that expressions propagating, inciting or justifying hatred based on intolerance, including religious intolerance, do not enjoy the protection of Article 10**. In the Court's view, **the comments and statements of Müslüm Gündüz expressed during the lively television debate could not**

be regarded as a call to violence or as "hate speech" based on religious intolerance. The Court underlined that **merely defending the sharia, without calling for the use of violence to establish it, cannot be regarded as "hate speech".** Notwithstanding the margin of appreciation accorded to the national authorities, the Court is of the opinion that for the purposes of Article 10 there were insufficient arguments to justify the interference in the applicant's right to freedom of expression. By six votes to one the Court came to the conclusion that there had been a violation of Article 10. The Turkish Judge, M. Türmen, dissented with the majority of the Court. He is of the opinion that the statements of Müslüm Gündüz contained "hate speech" and were offending for the majority of the Turkish people who have chosen to live in a secular society.

(See also Leyla Şahin v. Turkey, 29 June 2004 and 10 November 2005 (Grand Chamber), restrictions on freedom of religion from the scope of Article 9 Convention – headscarf as form of religious expression; Erbakan v. Turkey, 5 July 2006. See other cases against Turkey)

34.- Amihalachioiae v. Moldova, 20 April 2004 (freedom of expression of lawyer, public debate, conviction because of lack of respect for Constitutional Court, press interview)

The applicant, a lawyer and President of the Union of Lawyers in Moldova was imposed an administrative fine for being disrespectful towards the (judges of the) Constitutional Court. In an interview which was published in a journal, the applicant criticised firmly a decision of the Constitutional Court declaring unconstitutional the statutory provisions requiring lawyers to be member of the Union of Lawyers of Moldova, such a condition being a violation of the freedom of association according to the Constitutional Court. Amihalachioaie was penalised for stating that, as a result of the decision by the Moldovan Constitutional Court "complete chaos would reign in the legal profession" and that the question therefore arose as whether the Constitutional Court was constitutional. The Constitutional Court also penalised the applicant for asserting that its judges "probably did not consider the European Court of Human Rights to be an authority".

The European Court of Human Rights noted that although the Moldovan **legislation did not define with absolute precision the actions that had been penalised**, on account of his professional training and experience the applicant could reasonably have foreseen that his remarks were capable of being caught by Article 82 (e) of the Code of Constitutional Procedure, penalising the lack of respectfulness towards the Constitutional Court. The Court also accepted that the interference pursued a legitimate aim, which was to **maintain the authority and impartiality of the judiciary**. The Court however was of the opinion that the interference in the applicant's freedom of expression was not necessary in a democratic society: Amihalachioaie's statements concerned **a matter of general interest** which was the subject of a fierce controversy among lawyers and the decision of the Constitutional Court could put an end to the organisation of lawyers into a single structure, the Union of Lawyers, of which the applicant was the president. The statements of the applicant, even if they contained a certain lack of consideration towards the Constitutional Court, **could not be regarded as serious or insulting** towards the judges of the Court. Furthermore, since the applicant had subsequently denied part of the statements attributed to him by the press the European Court was of the opinion that Amihalachioaie **could not be considered responsible for everything that had been published in the interview**. Since the applicant had not exceeded the limits of criticism permissible under Article 10 of the Convention, the interference complained of by Amihalachioaie was regarded as a violation of the freedom of expression.

(See also Schöpfer v. Switzerland, 20 May 1998 and Wille v. Liechtenstein, 28 October 1999)

35.- Plon (Société) v. France, 18 May 2004 (medical secret, injunction prohibiting distribution of a book, final order maintaining the prohibition of the distribution of a book)

In this case about the book of Dr. Gubler *"Le Grand Secret"* (a book about the former president Mitterrand and how his cancer had been diagnosed and medically treated) the central question is whether the prohibition of the distribution of the book was to be considered as necessary in a democratic society in order to protect the deceased president's honour, his reputation and the intimacy of his private life. Many items of information revealed in the book were also legally confidential and hence were capable of infringing the rights of others.

As to whether the interference by the French courts ordering the prohibition of the distribution of the book of Dr. Gubler on request of Mitterrand's widow and children, met a pressing social need, the Court is of the opinion that the publication of the book had taken place in the **context of a general-interest debate**. This debate had already been going on for some time in France and was about the right of the public to be informed about serious illnesses of the president and his aptitude to hold this office, being aware that he was seriously ill.

The European Court considered **the interim ban on the distribution** of *"Le Grand Secret"* few days after Mitterrand death and until the relevant courts had ruled on its compatibility with medical confidentiality and the rights of others as **necessary in a democratic society** for the protection of the rights of the President Mitterrand and his heirs and successors.

The ruling however, more than nine months after Mitterrand's death, to keep the ban on the book is considered as a violation of Article 10 of the Convention. Moreover, at the time when the French court ruled on the merits of the case 40,000 copies of the book had already been sold, the book had been published on the internet and it had been the subject of much comment in the media. Accordingly, **preserving medical confidentiality could no longer constitute a preponderant imperative**. The Court consequently considered that when de French court gave judgment there was no longer a pressing social need justifying the continuation in force of the ban on distribution of "Le Grand Secret". While the Court found **no violation on account of the injunction prohibiting distribution of the book issued as an interim measure by the urgent applications judge** (*summary proceedings*), the European Court comes to the conclusion of **a violation** of Article 10 of the Convention on account of **the order maintaining that prohibition in force made by the civil court which ruled on the merits.**

(See also Observer and Guardian v. the United Kingdom and Sunday Times n° 2 v. the United Kingdom, 26 November 1991)

36.-Vides Aizsardzības Klubs (VAK) v. Latvia, 27 May 2004 (freedom of expression of NGO, public debate, environment protection, criticism of public figure, NGO role as watchdog, factual allegations, value judgment, burden of proof)

The applicant, an NGO based in Riga activating for environment protection, was convicted for publishing defamatory allegations about a mayor who, according to VAK, had signed illegal documents, decisions and certificates and had wilfully omitted to comply with the instruction of the relevant authorities to halt illegal building works. VAK was sued in court and in a judgment of 23 August 1999 was ordered to publish an official apology and pay damages to the mayor for publishing these defamatory statements in a resolution that was also published in a regional newspaper.

In a judgment of 27 May 2004 the Court emphasised that the main issue of the resolution of VAK had been to draw the public authorities' attention to a sensitive issue of public interest, namely the malfunctions in an important sector managed by the local authorities. As an NGO specialised in the relevant area, VAK had thus exercised its role of "**watchdog**" under the Environmental Protection Act. According to the European Court **that kind of participation by an NGO in public debate contributes to the transparency of public authorities' activities and is essential in a democratic society**. The European Court is of the opinion that VAK succeeded to establish sufficiently the truth of its factual allegations against the mayor. Given the limits on permissible criticism of a public figure, and taking into account the Latvian mayor's powers with regard to environmental protection, the criticism of the mayor for the policy of an entire local authority could not be regarded as an abuse of the freedom of expression. In a democratic society public authorities are to be exposed to **permanent scrutiny by citizens** and everyone has to be able to draw the public's attention to situations that they consider unlawful. **Describing the mayor's conduct as "illegal" is considered by the European Court as expressing a personal legal opinion amounting to a value judgment of which the accuracy cannot be required to be proven**. For all these reasons and despite the discretion afforded to the national authorities, the Court held that there had not been a reasonable relationship of proportionality between the restrictions imposed on the applicant organisation's freedom of expression and the legitimate

aim pursued. Unanimously the Court found a violation of Article 10 of the Convention.

(See also Karhuvaara and Iltalethi v. Finland, 16 November 2004 and Selistö v. Finland, 16 November 2004)

37.- Von Hannover v. Germany, 24 June 2004 (freedom of expression by "entertainment press", privacy, public figure, publication of photographs, paparazzi)

The European Court of Human Rights in a judgment of 24 June 2004 has come to the conclusion that Germany has not awarded a sufficient level of protection to the right of privacy of Princess Caroline von Hannover. On several occasions Caroline von Hannover, the daughter of Prince Rainier III of Monaco, applied to the German courts for an injunction preventing any further publication of a series of photographs which had appeared in the German magazines *Bunte, Freizeit Revue* and *Neue Post*. As Caroline von Hannover was to be considered undeniably as **a contemporary public figure "par excellence",** the German courts were of the opinion that she had to tolerate the publication of the photographs, except those in which she appeared with her children or with a friend in a secluded place in a restaurant. Other photos however showing Caroline van Hannover on horseback, shopping, cycling or skiing were to be considered as falling under **the right of the press to inform the public on events and public persons in contemporary society**, just like a series of photographs showing the Princess in the *Monte Carlo Beach Club*.

In its judgment of 24 June the Strasbourg Court agreed with Caroline von Hannover that the decisions of the German courts infringed her **right to respect for her private life** as guaranteed by Article 8 of the Convention. The Court recognizes that "the protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention", emphasizing at the same time that "the present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, **photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution**". In such circumstances priority has to be given to respect of the right of privacy. As a matter of fact "a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "imparting information and ideas on matters of public interest", it does not so in the latter case". According to the Court the sole purpose of the publication of the photos was to **satisfy the curiosity of a particular readership regarding the details of the applicant's private life**. In these conditions freedom of expression calls for a narrower interpretation. The Court also stated that "increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data. This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public". In the Court's view, merely classifying the applicant as a figure of contemporary society "par excellence", does not suffice to justify an intrusion into her private life. The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had **a "legitimate expectation" of protection of her private life**. Unanimously, the Court reaches the conclusion that the German courts did not strike a fair balance between the competing rights and that there has been a violation of Article 8 of the Convention.

(See also White v. Sweden, 19 September 2006 and Standard Verlag (n° 2) v. Austria, 4 June 2009)

38.- Pedersen and Baadsgaard v. Denmark, 17 December 2004 – Grand Chamber (defamation of police man, burden of proof, lack of evidence, ethics of journalism)

In Strasbourg, two journalists of Danish National television (*Danmarks Radio*) complained about their conviction for defamation of a Chief Superintendent. The journalists, Pedersen and Baadsgaard, had produced two programmes about a murder trial in which they had criticised the police's handling of the investigation. At the end of

the programmes, the question was raised if it was the chief superintendent who had decided that a report should not be included in the case or who concealed a witness's statement from the defence, the judges and the jury. Both journalists were charged with defamation and convicted and sentenced to DKK 400 (53 EUR) and ordered to pay DKK 100.000 (13.400 EUR). The domestic courts came to the conclusion that the journalists lacked a sufficient factual basis for the allegation that the named chief superintendent had deliberately suppressed a vital piece of evidence in the murder case. In a Chamber judgment of 19 June 2003, the Court held by four votes to three, that there had been no violation of Article 10. On 3 December 2003 the panel of the Grand Chamber accepted a request by the applicants for the case to be referred to the Grand Chamber. The Danish Union of Journalists was given leave to submit written comments.

The Grand Chamber of the European Court of Human Rights in its judgment of 17 December 2004 has also come to the conclusion, by nine votes to eight (!), that there had been **no violation of Article 10**. The Court emphasizes that the accusation against the named chief superintendent was an **allegation of fact susceptible of proof, while the applicants never endeavoured to provide any justification for their allegation, and its veracity had never been proven**. The applicants also relied on just one witness. The allegation of deliberate interference with evidence, made at peak viewing time on a national TV station, was very serious for the named Chief Superintendent and would have entailed criminal prosecution had it been true. The offence alleged was punishable with up to nine years' imprisonment. It inevitably not only prejudiced public confidence in him, but also disregarded his right to be presumed innocent until proven guilty according to law. In the Courts' view, the finding of a procedural failure in the conduct of the investigation in the murder case as such could not provide a sufficient factual basis for the applicants' accusation that the chief superintendent had actively tampered with evidence. The Courts reached the conclusion that the interference in the applicants' freedom of expression was not violating Article 10 of the Convention, as the conviction was necessary for the protection of the reputation and the rights of others. **Eight of the 17 judges of the Grand Chamber Court dissented, emphasizing the vital role of the press as public watchdog in imparting information of serious public concern and referring to the fact that the applicants had conducted a large-scale search for witnesses when preparing their programmes and that they had a sufficient factual basis to believe that a report did not contain the full statement of an important witness**. According to the minority a chief superintendent of police must accept that his act and omissions in an important case should be subjected to close and indeed rigorous scrutiny.

39.- Cumpănă and Mazăre v. Romania, 17 December 2004 – Grand Chamber (defamation and insult of judge, privacy, burden of proof, lack of evidence, ethics of journalism, (dis)proportionality of sanctions)

Constantin Cumpănă and Radu Mazăre are both professional journalists who have been convicted in Romania of insult and defamation. In April 1994 they published an article in the *Telegraf* newspaper questioning the legality of a contract in which the Constanţa City Council had authorised a commercial company, *Vinalex*, to perform the service of towing away illegally parked vehicles. The article, which appeared under the headline "Former Deputy Mayor D.M. and serving judge R.M. responsible for series of offences in *Vinalex* scam", was accompanied by a cartoon showing the judge, Mrs R.M., on the former deputy mayor's arm, carrying a bag marked "*Vinalex*" containing banknotes. Mrs R.M., who had signed the contract with *Vinalex* on behalf of the city council while employed by the council as a legal expert, brought proceedings against Cumpănă and Mazăre. She submitted that the cartoon had led readers to believe that she had had intimate relations with the former deputy mayor, despite the fact that they were both married. In 1995 both journalists were convicted of insult and defamation and sentenced to seven months' imprisonment. They were also disqualified from exercising certain civil rights and prohibited from working as journalists for one year. In addition, they were ordered to pay Mrs R.M. a specified sum for non-pecuniary damage. In November 1996 the applicants were granted a presidential pardon releasing them from their custodial sentence.

In a Chamber judgment of 10 June 2003 the Strasbourg Court held by five votes to two that there had been no violation of Article 10 of the Convention, emphasizing that the article and the cartoon were indeed damaging the authority, reputation and private life of judge R.M., overstepping the bounds of acceptable criticism. The

Grand Chamber of the European Court in its judgment of 17 December 2004 has now unanimously come to the conclusion that there **has been a violation of Article 10**. As the allegations and insinuations in the article did not have a sufficient factual basis, the Court is of the opinion that the Romanian authorities were entitled to consider it necessary to restrict the exercise of the applicants' right to freedom of expression and that their conviction for insult and defamation had accordingly met a "pressing social need". However, **the Court observes that the sanctions imposed on the applicants have been very severe and disproportionate**. In regulating the exercise of freedom of expression in order to ensure adequate protection by law of individuals' reputations, **States should avoid taking measures that might deter the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power**. **The imposition of a prison sentence for a press offence is compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights had been seriously impaired, as, for example, in the case of hate speech or incitement to violence**. In a classic case of defamation, such as the present case, **imposing a prison sentence inevitably has a chilling effect**. Also the order disqualifying the applicants from exercising certain civil rights is to be considered particularly inappropriate and is not justified by the nature of the offences for which both journalists have been held criminally liable. The order prohibiting the applicants from working as journalists for one year is considered as a preventive measure of general scope **contravening the principle that the press must be able to perform the role of a public watchdog in a democratic society**. The Court comes to the conclusion that, although the interference with both journalists' right to freedom of expression might have been justified as such, the criminal sanction and the accompanying prohibitions imposed on them by the Romanian courts have been manifestly disproportionate in their nature and severity to the legitimate aim pursued. The Court therefore holds that there has been a violation of Article 10 the Convention.

(See also Hrico v. Slovakia, 20 July 2004 and Sabou en Pîrcălab v. Romania, 28 September 2004)

40.- Steel and Morris v. the United Kingdom, 15 February 2005 (defamation/libel, leaflets, anti-McDonald's campaign, fair trial, denial of legal aid for defendants in libel case, public debate on activities of powerful commercial entities, chilling effect, disproportionate character of award of damages).

The European Court of Human Rights in a judgment of 15 February 2005 has come unanimously to the conclusion that the United Kingdom has violated Article 6 (*fair trial*) and Article 10 (*freedom of expression*) of the European Convention on Human Rights in a libel case opposing McDonald's Corporation against two United Kingdom nationals, Helen Steel and David Morris, who had distributed leaflets as part of an **anti-McDonald's campaign**. In 1986 a six-page leaflet entitled "What's wrong with McDonald's?" was distributed by Steel and Morris and in 1990 **Mc Donald's** issued a writ against them **claiming damages for libel**. The trial took place before a judge sitting alone from June 1994 until December 1996, it was the longest trial in English legal history. On appeal the judgment of the trial judge was upheld in substance, the damages awarded were reduced by the Court of Appeal to a total of GBP 76,000. Leave to appeal to the House of Lords was refused. Throughout the trial and appeal proceedings **Steel and Morris were refused legal aid**: they represented themselves only with some help from volunteer lawyers. Steel and Morris applied to the European Court complaining that the proceedings were unfair principally because they were denied legal aid, although they where unwaged and dependant on income support. They applicants also argued that the outcome of the proceedings constituted a disproportionate interference with their freedom of expression. With regard the first complaint under **Article 6 § 1** the Court is of the opinion that the **denial of legal aid** to the applicants had deprived them of the opportunity to present their case effectively before the Court and contributed to an unacceptable **inequality of arms** with McDonald's, who in this complex case, lasting 313 court days and involving 40,000 pages of documentary, had been represented by leading and junior counsel, experienced in defamation law and by two solicitors and other assistants. With regard the second complaint, the Court reaches the conclusion that there has been **a violation of Article 10 of the Convention**. Although it is not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defam-

atory statements, it is considered essential by the Court that when a legal remedy is offered to a large multinational company to defend itself against defamatory allegations, also **the countervailing interest in free expression and open debate must be guaranteed by providing procedural fairness and equality of arms to the defendants in such a case**. The Court also emphasizes the general interest in **promoting the free circulation of information and ideas about the activities of powerful commercial entities**, as well as the potential "chilling" effect on others an award of damages for defamation in this context may have. Moreover, according to the Strasbourg Court, the award of damages was disproportionate to the legitimate aim served in order to protect the right and reputation of McDonalds, as **the sum of GPP 76,000 was not in a reasonable relation of proportionality to the injury to reputation suffered**. Given the lack of procedural fairness and the disproportionate award of damages, the Court found that there has been a violation of Article 10 in this case, which in the media has been labelled as the "McLibel"-case. The United Kingdom is ordered to pay 35,000 Euro to the applicants in respect of non-pecuniary damages and 47,311 Euro in respect of costs and expenses related to the Strasbourg proceedings.

41.- Independent News and Media v. Ireland, 16 June 2005 (defamation of politician, amount of damages, proportionality)

The European Court of Human Rights in this case is of the opinion that a conviction to pay an award of damages of **381.000 euros** because of **defamatory statements** in a press article criticizing a politician, is not to be considered as a violation of Article 10 of the European Convention of Human Rights. In 1997 a High Court jury in Ireland found an article published in the *Sunday Independent* robustly criticizing a national politician, Mr. de Rossa, to be defamatory and awarded Mr. de Rossa 300.000 Irish pounds (381.000 euros) in damages. The award, which was upheld by the Supreme Court, was three times the highest libel award previously approved in Ireland. The litigious article referred to some activities of a criminal nature of the political party of Mr. de Rossa and criticised his former privileged relations with the Central Committee of the Communist Party of the Soviet Union. According to the article, de Rossas political friends in the Soviet Union *"were no better than gangsters (..). They were anti-Semitic"*. In upholding the award of damages, the Supreme Court took into account a number of factors, including the gravity of the libel, the effect on Mr. de Rossa as leader of a political party and on his negotiations to form a government at the time of publication, the extent of the publication, the conduct of the first applicant newspaper and the consequent necessity for Mr. de Rossa to endure three long and difficult trials. Having assessed these factors, it concluded that the jury would have been justified in going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation. While IR£300,000 was a substantial sum, it noted that the libel was serious and grave, involving an imputation that Mr. de Rossa was involved in or tolerated serious crime and personally supported anti-Semitism and violent Communist oppression. Bearing in mind that a fundamental principle of the law of compensatory damages is that **the award must always be reasonable and fair and bear a due correspondence with the injury suffered and not be disproportionate thereto**, the Supreme Court was not satisfied that the jury award went beyond what a reasonable jury applying the law to all the relevant considerations could reasonably have awarded and considered it *"not disproportionate to the injury suffered by Mr. de Rossa"*. The press groups publishing the *Sunday Independent* lodged an application before the Strasbourg Court, complaining that the exceptional damages' award and the absence of adequate safeguards against disproportionate awards violated their rights under Article 10 of the Convention (freedom of expression). The application was also supported by some other Irish media groups and by the *National Union of Journalists* (NUJ).

Taking its judgment of 13 July 1995 in the case of *Tolstoy Miloslavsky v. the United Kingdom* as a point of departure, the Court is of the opinion that the present jury award was sufficiently unusual as to require a review by the Court of the adequacy and effectiveness of the domestic safeguards against disproportionate awards. According to the Court unpredictably large damages´ awards in libel cases are considered capable of having a chilling effect on the press and therefore require the most careful scrutiny. The Strasbourg Court however, referring to the judgment of the Irish Supreme Court upholding and legitimising the award of damages, comes to the conclusion, by 6 votes to 1, that there has been no violation of the right of freedom of expression in this case: *"Having regard to the particular circumstances of the present case, notably the measure of appellate control, and the margin of*

appreciation accorded to a State in this context, the Court does not find that it has been demonstrated that there were ineffective or inadequate safeguards against a disproportionate award of the jury in the present case". In his **dissenting opinion** judge Cabral Barreto of Portugal argues that the amount of damages which the publishing group of the *Sunday Independent* was ordered to pay was so high *"that the reasonable relationship of proportionality between the interference and the legitimate aim pursued was not observed"*. The 6 judges of the majority however came to the conclusion that there has not been a violation of Article 10 of the Convention.

42.- Grinberg v. Russia, 21 July 2005 (defamation of politician, value judgments, limits of acceptable criticism)

The European Court in a judgment of 21 July 2005 has come to the conclusion that the Russian authorities overstepped the margin of appreciation afforded to member states by convicting a Russian citizen because of a **defamatory statement** in a press article criticizing a politician. It is the first judgment in which the European Court finds a violation of the freedom of expression by the Russian authorities since the Russian federation became member of the Council of Europe and the European Convention on Human Rights in 1996. The Strasbourg Court once again emphasizes the distinction that is to be made between statements of **fact and value judgments**. The Court considers it unacceptable that the Russian law on defamation, as it stood in the material time, made no distinction between these two different notions, referring uniformly to statements and assuming that any statement was amenable to proof in civil proceedings. The case goes back to an article in the *Guberniya* newspaper written by Isaak Pavlovich Grinberg in 2002. The article criticised the elected Governor of the Ulyanovsk Region, the former General V.A. Shamanov for "waging war" against the independent press and journalists. The article also referred to the support by Mr. Shamanov for a colonel who had killed a 18-year-ol Chechen girl, considering that Mr. Shamanov had "no shame and no scruples". On 14 November 2002 the Leninskiy District Court of Ulyanovsk found that the assertion that Mr. Shamanov had no shame and no scruples impaired his honour, dignity and professional reputation and that Mr. Grinberg had not proved **the truthfulness** of this statement. On 24 December 2002 the judgment was confirmed by the Regional Court, while the Supreme Court on 22 August 2003 dismissed Mr. Grinberg's application for the institution of supervisory-review proceedings.

Grinberg's complaint under Article 10 of the Convention about a violation of his right to impart information and ideas turned out to be successful however before the European Court in Strasbourg. The Court refers to its well-established case law on the freedom of expression as one of the essential foundation of a democratic society, on the essential function of the press to play its vital role of "**public watchdog**", on the fact that there is little scope under Article 10 § 2 for restrictions on political speech and especially on the distinction that is to made in defamation cases between statements of fact and value judgments, emphasizing that while the existence of facts can be demonstrated, the **truth of value judgments is not susceptible of proof**. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself. The Strasbourg Court considers that the contested comment was a clear example of a value judgment that represented Mr.Grinberg's subjective appraisal of the moral dimension of Mr. Shamanov's behaviour who in his eyes only kept one promise after being elected as Governor, and that was waging war against the independent press and journalists. The Court takes into account that the contested press article concerned an issue of public interest, that of freedom of the media in the Ulyanovsk region and that it **criticised an elected, professional politician in respect to whom the limits of acceptable criticism are wider than in case of a private individual**. The facts which gave rise to the criticism were not contested and Mr. Grinberg had after all expressed his views in an inoffensive manner. Neither did Mr. Grinberg's statements affect Mr. Shamanov's political career or his professional life. For these reasons the Strasbourg Court unanimously came to the conclusion that the domestic courts did not convincingly establish any pressing social need for putting the protection of the politician's personality rights above the applicant's right to freedom of expression and the general interest in promoting this freedom where issues of public interest are concerned. Accordingly there has been a violation of Article 10 of the Convention.

(See also Sokolowski v. Poland, 29 March 2005, Ukrainian Media Group v. Ukraine, 29 March 2005; Salov v. Ukraine, 6 September 2005; Karman v. Russia, 14 December 2006)

42.- I.A. v. Turkey, 13 September 2005 (abusive attack on one's religion, offending attack on matters regarded as sacred by Muslims)

In this case the European Court of Human Rights has come to the conclusion that the Turkish authorities did not violate the freedom of expression by convicting a book publisher for publishing **insults against "God, the Religion, the Prophet and the Holy Book**". The managing director of the *Berfin* publishing house in France was sentenced to two year's imprisonment, which was later commuted to a fine. The European Court is of the opinion that this interference in the applicant's right to freedom of expression had been prescribed by law (art. 175 §§ 3 and 4 Criminal Code) and had pursued the legitimate aims of **preventing disorder and protecting morals and the rights of others.** The issue for the Court was to determine whether the conviction of the publisher had been necessary in a democratic society. This involved the balancing of the applicant's right to impart his ideas on religious theory to the public, on the one hand, and the right of others to respect for their freedom of thought, conscience and religion, on the other hand. The Court reiterates that religious people have to tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. A distinction is to be made however **between "provocative" opinions and abusive attacks on one's religion**. According to the Court, one part of the book contained indeed an abusive attack on the Prophet of Islam, whereas it is asserted that some of the statements and words of the Prophet were "inspired in a surge of exultation, in Aisha's arms... God's messenger broke his fast trough sexual intercourse, after dinner an before prayer". In the book it is stated that "Mohammed did not forbid sexual intercourse with a dead person or a living animal". The Court accepts that believers could legitimately feel that these passages of the book constituted an unwarranted and offensive attack on them. Hence, the conviction of the publisher was a measure that was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. As the book was not seized and the publisher had only to pay an insignificant fine, the Court comes, by four votes to three, to the conclusion that the Turkish authorities did not violate the freedom of expression. According to the three dissenting opinions (of the French, Portuguese and Czech judge) the majority of the Court followed its traditional case law on blasphemy leaving a wide margin of appreciation to the member states. According to the three dissenters the Court should reconsider its jurisprudence in the case of Otto-Preminger-Institut v. Austria and Wingrove v. UK, as this approach gave too much support to conformist speech and to the "pensée unique", implying a cold and frightening approach of freedom of expression. The majority of the Court however (the Turkish, Georgian, Hungarian and San Marino judge) argued why the conviction of the book publisher met a pressing social need protecting the rights of others. Accordingly there has been **no violation of Article 10 of the Convention**.

43.- Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria, 27 October 2005 (defamation of politician, value judgments, factual basis, disproportionate sanction)

The European Court of Human Rights in a judgment of 27 October 2005 has come to the conclusion that the Austrian authorities violated the freedom of expression by convicting *Wirtschafts-Trend Zeitschriften-Verlags GmbH*, a limited liability company based in Vienna which owns and publishes the weekly magazine *Profil*. In November 1998 *Profil* published a book review written by a Member of the European Parliament and member of the Austrian Freedom Party. The article criticised the author of the book for his treatment of Jörg Haider, the former leader of the Austrian Freedom Party (FPÖ), in that he pardoned "his belittlement of the concentration camps as 'punishment camps'" ("*Dessen Verharmlosung der Konzentrationslager als 'Straflager'*"). Mr Haider filed successfully a compensation claim against *Profil* as the Wiener Neustadt Regional Court ordered the applicant company to pay 3,633 euros in compensation to Mr Haider. It also ordered the forfeiture of that particular issue of the magazine and instructed the company to publish its judgment. In its reasoning the court said that Mr Haider's words had been taken **out of context** and that the article gave the impression that he had played down the extent of crimes committed in concentration camps when using the term punishment camps, and that he had thereby infringed the National Socialism Prohibition Act.

In its judgment of 27 October 2005 the European Court reiterates that the limits of acceptable criticism are wider as regards a politician than as regards a private individual. The Court is of the opinion that **Haider** is a leading politician who

has been known for years for his **ambiguous statements about the National Socialist Regime and the Second World War** and has, thus, exposed himself to fierce criticism inside Austria, but also at the European level. In the Court's view Haider must therefore display a **particularly high degree of tolerance** in this context. In essence, the Strasbourg Court is not convinced by the domestic courts' argument that the statement of belittling the concentration camps implied a reproach that Mr Haider had played down the extent of the Nazi crimes and came therefore close to a reproach of criminal behaviour under the Prohibition Act. The Court finds this conclusion somewhat far-fetched, as the standards for assessing someone's political opinions are quite different from the standards for assessing an accused person's responsibility under criminal law. According to the Court, the use of the term "punishment camp", which implies that persons are detained there for having committed punishable offences, may reasonably be criticised as a belittlement of the concentration camps all the more so if that term was applied by someone whose ambiguity towards the Nazi era is well-known. The undisputed fact that Mr Haider had used the term punishment camp instead of concentration camp was a **sufficient factual basis for the applicant's statement**, which was therefore not excessive in the circumstances. In conclusion, the Court finds that the reasons adduced by the domestic courts were not relevant and sufficient to justify the interference. Moreover, the Court notes that the applicant was not only ordered to pay compensation to Mr Haider and to publish the judgment finding it guilty of defamation, but that the courts also ordered the forfeiture of the issue of *Profil* which is a severe and intrusive measure. Thus, the interference was not proportionate either. Therefore, the Court unanimously came to the conclusion that the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. Accordingly there has been **a violation of Article 10** of the Convention.

(See also Urbino Rodrigues v. Portugal, 29 November 2005)

44.- Tourancheau and July v. France, 24 November 2005 (pre-trial publicity, secret of criminal investigation, court reporting, prejudicial effect on jury)

On 28 October 1996 the national daily newspaper *Libération*, published an article by Patricia Tourancheau entitled "Adolescent love ends in stabbing". The article focussed on a murder case. The criminal investigation was still pending when the article was published and two suspects, a young man, B. and his girlfriend, A., had been placed under investigation. Each accused the other of the crime, but the young man had been released while his girlfriend was in pretrial detention. The article in *Libération* reproduced extracts from statements made by A. to the police and the investigating judge, and comments from B. contained in the case file or noted down during the interview he had given to Tourancheau. On the basis of section 38 of the Freedom of the Press Act of 29 July 1881, criminal proceedings were brought against Tourancheau and against de editor of *Libération*, Serge July. Section 38 of the Press Act 1881 prohibits the publication of any document of the criminal proceedings (*"actes de procedures criminelle ou correctionelle"*) until the day of the hearing in court. Both the journalist and the editor were found guilty as charged at first instance and were each ordered to pay a fine of 10,000 French francs (FRF), about 1,525 euros (EUR). Their conviction was upheld on appeal, although payment of the fine was suspended. In a judgment of 22 June 1999 the Court of Cassation dismissed an appeal by the applicants. In the meantime, on 10 June 1998, A. had been sentenced to eight years' imprisonment for murder and B. had received a five-year prison sentence for failure to assist a person in danger.

In a judgment of 24 November 2005 the Strasbourg Court has come to the conclusion that the conviction of Tourancheau and July was not to be considered as a violation of Art. 10 of the Convention. The Court noted that section 38 of the 1881 Freedom of the Press Act defined the scope of the legal prohibition clearly and precisely, in terms of both content and duration, as it was designed **to prohibit publication of any document relating to proceedings concerning serious crimes or other major offences until the day of the hearing**. The fact that proceedings were not brought systematically on the basis of section 38 of the 1881 Act, the matter being left to the discretion of the public prosecutor's office, did not entitle the applicants to assume that

they were in no danger of being prosecuted, since they were **as professional journalists familiar with the law**. They had therefore been in a reasonable position to foresee that publication of extracts from the case file in the article might render them liable to prosecution. The interference in question could be regarded as being "prescribed by law" and to be considered to protect "the reputation and rights of others" and to maintain "the authority and impartiality of the judiciary".

In the Court's view, the reasons given by the French courts to justify the interference with the applicants' right to freedom of expression had been "relevant and sufficient" for the purposes of Article 10 § 2 of the Convention. The courts had stressed the damaging consequences of publication of the article for the protection of the reputation and rights of A. and B. and for their **right to be presumed innocent, and also for the authority and impartiality of the judiciary, owing to the possible impact of the article on the members of a lay jury**. The Court took the view that the applicants' interest in imparting information concerning the progress of criminal proceedings and the guilt of the suspects while the judicial investigation was still ongoing, and the interest of the public in receiving such information, were not sufficient to prevail over the considerations referred to by the courts. The Court further considered that the penalties imposed on the applicants were not disproportionate to the legitimate aims pursued by the authorities. In those circumstances, the Court held that the applicants' conviction had amounted to an interference with their right to freedom of expression which had been "necessary in a democratic society" in order to protect the reputation and rights of others and to maintain the authority and impartiality of the judiciary. It therefore held that there had been **no violation of Article 10.** In this case the Cypriot, Bulgarian, Croatian and Greek judge formed the smallest possible majority judges **(4/3 decision).**

The judges Costa, Tulkens and Lorenzen (France, Belgium and Denmark) expressed a joint dissenting opinion, in which they substantially argued why the conviction of the applicants is to be considered as a violation of the freedom of expression. Neither do they assume the breach of presumption of innocence, nor the possible impact on the lay judges of the jury as sufficiently pertinent arguments in order to legitimise the inference in the applicant's freedom of expression and the right of the public to be informed about matters of public interest. According to the joint dissenting opinion journalists must be able to freely report and comment on the functioning of the criminal justice system, as a basic principle enshrined in the **Recommendation of the Committee of Ministers 2003 (13)** on the provision of information trough the media in relation to criminal proceedings.

45.- Case of Giniewski v. France, 31 January 2006 (defamation of Christian community)

In 1994 the newspaper *Le quotidien de Paris* published an article with the headline "The obscurity of error", concerning the encyclical "The splendour of truth" (*Veritatis Splendor*) issued by Pope John Paul II. The article was written by Paul Giniewski, a journalist, sociologist and historian and contained a critical analysis of the particular doctrine developed by the Catholic Church and its possible links with the origins of the Holocaust. A criminal complaint was lodged against the applicant, the newspaper and its publishing director, alleging that they had **published racially defamatory statements against the Christian community**. The defendants were found guilty of defamation at first instance but were acquitted on appeal. Ruling exclusively on the civil claim lodged by the "General Alliance against Racism and for Respect for the French and Christian Identity" (*Alliance générale contre le racisme et pour le respect de l'identité française et chrétienne* – AGRIF), the Orléans Court of Appeal held that Giniewski was to pay damages to the AGRIF and that its ruling was to be published at his expense in a national newspaper. The Orléans Court of Appeal considered the litigious article as **defamatory toward a group of persons because of their belonging to a religion.** The applicant appealed to the Court of Cassation but without success.

In a judgment of 31 January 2006 the European Court of Human Rights is of the opinion that the article in question had contributed to discussion of the various possible reasons behind the extermination of Jews in Europe, **a question of indisputable public interest in a democratic society**. In such matters restrictions on freedom of expression are to be strictly construed. Although the issue raised in the present case concerned a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question showed that **it did not contain attacks on religious beliefs as such,** but a view

which the applicant had wished to express **as a journalist and historian**. In that connection, the Court considered it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to **crimes against humanity** should be able to take place freely. The article in question had, moreover, **not been "gratuitously offensive" or insulting and had not incited disrespect or hatred.** Nor had it cast doubt in any way on clearly established historical facts. In this perspective, the facts were different from those in I.A. v. Turkey (ECtHR 13 September 2005, offensive attack on the Prophet of Islam) and those in R. Garaudy v. France (ECtHR 24 June 2003, decision on admissibility, nr. 65831/01). The Court considered that the reasons given by the French courts could not be regarded as sufficient to justify the interference with the applicant's right to freedom of expression. Specifically with regard to the order to publish a notice of the ruling in a national newspaper at the expenses of the applicant, the Court considers that while the publication of such a notice did not in principle appear to constitute an excessive restriction on freedom of expression, the fact that it mentioned the criminal offence of defamation undoubtedly had a deterrent effect. The sanction thus imposed appeared disproportionate in view of the importance and interest of the debate in which the applicant had legitimately sought to take part. The Court therefore held that there has been a violation of Article 10 of the Convention.

(See also Albert-Engelmann-Gesellschaft mbH v. Austria, 19 January 2006; Aydin Tatlav v. Turkey, 2 May 2006 and Klein v. Slovakia, 31 October 2006. See also Paturel v. France, 22 December 2005)

46.- Case of Özgür Radyo v. Turkey, 30 March 2006 (suspension of radio licence)

In 1998 and 1999 the Istanbul radio station *Özgür Radyo* was given three warnings and its licence was twice suspended by the Turkish broadcasting regulatory authority (*Radyo Televizyon Üst Kurulu*, RTÜK). The first suspension was for a period of 90 days, the second suspension period lasted 365 days. Some of the programmes of *Özgür Radyo* had touched on various themes such as corruption, the methods used by the security forces to tackle terrorism and possible links between the State and the Mafia. The radio station was sanctioned by RTÜK because a programme was considered **defamatory** and other programmes **had incited the people to engage in violence, terrorism or ethnic discrimination**, had **stirred up hatred or offended the independence, the national unity or the territorial integrity of the Turkish State**. The radio station applied to the administrative courts for an order setting aside each of the penalties, but its applications were dismissed.

In its complaint to the European Court of Human Rights *Özgür Radyo* argued primarily that the penalties that had been imposed by the RTÜK entailed a violation of Article 10 of the European Convention (freedom of expression). As there was no discussion that the sanctions (both the warnings and the suspension of the licence) were prescribed by law (Art. 4 and 33 of the Broadcasting Act n° 3984 of 12 April 1991) and pursued a legitimate aim listed in Article 10 § 2, the decisive issue before the Court was whether the interference with the applicants' right to freedom of expression had been "necessary in a democratic society". In assessing the situation, the Court said it would have particular regard to **the words** that had been used in the programmes and to **the context** in which they were broadcast, including **the background to the case and in particular the problems linked to the prevention of terrorism**. The Court emphasizes that the programmes covered **very serious issues of general interest** that had been widely debated in the media and that the dissemination of information on those themes was entirely consistent with **the media's "watchdog" role in a democratic society**. The Court also notes that the information concerned had already been provided to the public. Some of the programmes had only orally reproduced, without comment, newspaper articles that had already been published and for which no one had been prosecuted. Moreover, *Özgür Radyo* had been careful to explain that it was citing newspaper articles and to identify the sources. The Court also observes that **although certain particularly acerbic parts of the programmes had made them to some degree hostile in tone, they had not encouraged the use of violence, armed resistance or insurrection and did not constitute hate speech**. The Court strongly underlines that this is an essential factor to be taken into consideration. Finally the Court refers to the severity of the penalties that had been imposed on the applicant company, especially in terms of the suspension of the licence, first for a period of 90 days and in a second decision for a period of one year, the latter being the **maximum penalty** prescribed in Art. 33 of the Turkish Broadcasting Act n° 3984. Taking into

regard all these elements of the case, the Strasbourg Court considers the penalties disproportionate to the aims pursued and, therefore, not "necessary in a democratic society". Consequently, the Court holds unanimously that there has been a violation of Article 10.

47.- Case of Dammann v. Switzerland, 25 April 2006 (protection of confidential or secret information, the media's watchdog-function)

In its judgment of 25 April 2006 the Court unanimously held that the Swiss authorities have violated Article 10 of the Convention by convicting a journalist, Viktor Dammann, **for inciting an administrative assistant of the public prosecutor's office to disclose an official secret.** The assistant, on demand of the journalist, had forwarded data relating to **criminal records of suspects** in a spectacular robbery. By punishing the journalist a step had been taken prior to publication and such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community and was thus liable to hamper the press in its role as provider of information and watchdog. Furthermore, **no damage had been done to the rights of the persons concerned, as the journalist had himself decided not to publish the data in question.** In these circumstances, the Court considered that Dammann's conviction had not been reasonably proportionate to the pursuit of the legitimate aim in question, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

(See also Weber v. Zwitserland, 22 May 1990; Observer and Guardian v. United Kingdom, 26 November 1991; Sunday Times (nr. 2) v. United Kingdom, 29 November 1991; Vereniging Weekblad 'Bluf!' v. the Netherlands, 9 February 1995; Fressoz and Roire v. France, 21 January 1999; Bladet Tromsø and Stensaas v. Norway, 20 May 1999; Colombani v. France, 25 June 2002; Plon (Société) v. France, 18 May 2004 and Radio Twist v. Slovakia, 19 December 2006)

48.- Case of Aydin Tatlav v. Turkey, 2 May 2006 (criticism of a religion without abusive attack, protection of pluralism)

In 1992 Erdoğan Aydin Tatlav, a journalist living in Istanbul, published a five volume book under the title *Islamiyet Gerçeği* (The Reality of Islam). In the first volume of the book he **criticised Islam** as a religion legitimising social injuries portraying them as "God's will". Following a complaint at the occasion of the fifth edition of the book in 1996, the journalist was prosecuted for publishing a work designed to defile one of the religions (art. 175 Crim. Code). He was sentenced to one year's imprisonment, which was converted into a fine.

Before the European Court of Human Rights Tatlav complained that this conviction had been in breach of Article 10 of the Convention, referring to the right of freedom of expression "without interference by public authority". Essentially, the Court evaluated whether the interference in the applicant's right could be legitimised for the protection of the morals and the rights of others as "necessary in a democratic society". The Court is of the opinion that certain passages of the book contained **strong criticism of religion in a social-political context**, but that these passages had **no insulting tone and neither contained an abusive attack against Muslims or against sacred symbols of Muslim religion** (see I.A. v. Turkey, 13 September 2005). The Court did not exclude that Muslims could nonetheless feel offended by the caustic commentary on their religion, but this was not considered a sufficient reason to legitimise the criminal conviction of the author of the book. The Court also took account of the fact that although the book had first been published in 1992, no proceedings had been instituted until 1996, when the fifth edition was published. It was only following a complaint by an individual that proceedings had been instituted against the journalist. With regard the punishment imposed on Tatlav, the Court is of the opinion that a criminal conviction involving, moreover, the risk of a custodial sentence, **could have the effect of discouraging authors and editors from publishing opinions about religion that were not conformist and could impede the protection of pluralism, which is indispensable for the healthy development of a democratic society**. Taking into regard all these elements of the case, the Strasbourg Court considers the interference by the Turkish authorities disproportionate to the aims pursued. Consequently, the Court holds unanimously that there has been a violation of Article 10 of the Convention

(See also Giniewski v. France, 31 January 2006).

49.- Case of White v. Sweden, 19 September 2006 (right of privacy, suspected person, picture, presumption of innocence, reporting on issue of major public interest)

In 1996, the two main evening newspapers in Sweden, *Expressen* and *Aftonbladet*, published a series of articles in which various criminal offences were ascribed to Anthony White, a British citizen residing in Mozambique. **The articles also included an assertion that Mr. White had murdered Olof Palme**, the Swedish Prime Minister, in 1986. Mr White was a well-known figure whose alleged illegal activities had already been the focus of media attention. The newspapers also reported statements of individuals who rejected the allegations made against Mr White. In interview published in *Expressen*, Mr White denied any involvement in the alleged offences. Mr White brought a private prosecution against the editors of the newspapers for defamation under the Freedom of Press Act and the Swedish Criminal Code. The District Court of Stockholm acquitted the editors and found that it was justifiable to publish the statements and pictures, given that there was considerable public interest in the allegations. It further considered that the newspapers had a reasonable basis for the assertions and that they had performed the checks that were called for in the given circumstances, taking into regard the constraints of a fast news service. The Court of Appeal upheld the District Court's decision.

Mr White complained before the European Court of Human Rights in Strasbourg that the Swedish courts had failed to provide due protection for his name and reputation. He relied on Article 8 (right to respect for private and family life). **The European Court found that a fair balance has to be struck between the competing interests, being the freedom of expression (Article 10) and the right to respect for privacy (Article 8),** also taking into account that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proven guilty in accordance to the law. The Court first notes that as such the information published in both newspapers constituted defamation to the applicant. The statements clearly tarnished his reputation and disregarded his right to be presumed innocent until proven guilty as it appeared that Mr. White had not been convicted of any of the offences ascribed by him. However in the series of articles, the newspapers had endeavoured to present an account of the various allegations made which was **as balanced as possible and the journalists had acted in good faith**. Moreover, the unsolved murder of the former Swedish Prime Minister Olof Palme and the ongoing criminal investigations were matters of **serious public interest and concern**. The Strasbourg Court considered that the domestic courts made a thorough examination of the case and balanced the opposing interests involved in conformity with Convention standards. The European Court found that **the Swedish courts were justified in finding that the public interest in publishing the information in question outweighed Mr White's right to the protection of his reputation**. Consequently, there had been no failure on the part of the Swedish State to afford adequate protection of the applicant's rights. For these reasons, the Court considered that there had been no violation of Article 8 (Compare with Gourguenidze v. Georgia, 17 October 2006; Leempoel and S.A. Ciné Revue v. Belgium, 9 November 2007 and Österreichischer Rundfunk v. Austria, 7 December 2006).

50.- Case of Klein v. Slovakia, 31 October 2006 (defamation, satire, public debate)

In March 1997 the weekly magazine *Domino Efekt* published an article written by Martin Klein, a journalist and film critic. In this article Klein criticised Archbishop Ján Sokol for his televised proposal to have the distribution of the film "The People v. Larry Flint" withdrawn as well as the poster publicising it. The article contained slang terms and innuendos with oblique vulgar and sexual connotations, allusions to the Archbishop's alleged cooperation with the secret police of the former communist regime and an invitation to the members of the Catholic Church to leave their church.

On complaints filed by two associations, criminal proceedings were brought against Klein**. The journalist was convicted of the offence of public defamation of a group of inhabitants of the republic for their belief** and he was sentenced to a fine of 375 euros, in application of Article 198 of the Slovakian Criminal Code. The Regional Court of Košice considered the article in question as vulgar, ridiculing and offending and hence not enjoying protection under Article 10 of the European Convention. It concluded that by the content of the article Klein had violated the rights, guaranteed by the Constitution, of a group of adherents to the Christian faith.

Contrary to the domestic courts' findings, **the European Court of Human Rights is not persuaded that the applicant had discredited and disparaged a sector of the population on account of their Catholic faith**. The applicant's strongly-worded pejorative opinion related exclusively to the Archbishop, a high representative of the Catholic Church in Slovakia. The fact that some members of the Catholic Church could have been offended by the applicant's criticism of the Archbishop and by his statement that he did not understand why decent Catholics did not leave that Church cannot affect that position. The Court accepts the applicant's argument **that the article neither unduly interfered with the right of believers to express and exercise their religion, nor denigrated the content of their religious faith.** Given that the article exclusively criticised the person of the Archbishop, the applicant's conviction of the criminal offence of defamation of other person's belief was in itself inappropriate in the particular circumstances of the case. **For those reasons, and despite the vulgar tone of the article, the Court found that it could not be concluded that by publishing the article the applicant interfered with the right to freedom of religion of others in a manner justifying the sanction imposed on him**. The interference with his right to freedom of expression therefore neither corresponded to a pressing social need, nor was it proportionate to the legitimate aim pursued. The Court held unanimously that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society" and that there had been a violation of Article 10 of the European Convention.

(See also Mamère v. France, 7 November 2006 and Verlagsgruppe News (1+2) v. Austria, 14 December 2006 and Dabrowski v. Poland, 19 December 2006. Compare with Kobenter and Standard Verlags GmbH v. Austria, 2 November 2006)

51.- Case of Mamère v. France, 7 November 2006 (defamation, public debate, television debat, militant expression, sarcastic but within limits of acceptable provocation)

On 11 October 2000 the Paris Criminal Court found Mr. Noël Mamère, a leading member of the ecologist party *Les Verts* and member of parliament, guilty for **public defamation** of the director of the *Central Service for Protection against Ionising Radiation* (SCPRI), Mr. Pellerin. Mr. Mamère was ordered to pay a fine of 10,000 francs, about 1,525 euros. The Paris Court of Appeal upheld the conviction considering that Mr. Mamère's **comments during a television programme** were defamatory as they had damaged Mr. Pellerin's "honour and reputation" by accusing him of repeatedly having "knowingly supplied, in his capacity as a specialist on radioactivity issues, erroneous or simply untrue information about such a serious problem as the Chernobyl disaster, which was of potential consequence for the health of the French population". The Court found that Mr. Mamère had not acted in good faith, as he had not adopted a moderate tone in insisting forcefully and peremptorily that Mr. Pellerin had repeatedly sought to lie and to distort the truth about the consequences of the Chernobyl nuclear accident, spring 1986. Mr. Mamère had also attributed "pejorative characteristics" by using the adjective "sinister" and by saying that he suffered from "the Asterix complex". In May 2006 following a complaint by certain individuals suffering from thyroid cancer, the *Commission for Research and Independent Information on Radioactivity* (CRIIRAD) and the *French Association of Thyroid Disease Sufferers* (AFMT), have recognised that the official services at the time had lied and had underestimated the contamination of soil, air and foodstuffs following the Chernobyl disaster.

The Strasbourg Court in its judgment of 7 November 2006 observes that the conviction of Mr. Mamère for aiding and abetting public defamation of a civil servant had constituted an interference with his right to freedom of expression that had been prescribed by the Freedom of the Press Act of 29 July 1881 and had pursued one of the legitimate aims listed in Article 10 § 2, namely **the protection of the reputation of others.** The Court however considers the interference as not necessary in a democratic society, as the case obviously was one in which Article 10 required a high level of protection of the right to freedom of expression. The Court underlines that the applicant's comments concerned **topics of general concern, namely protection of the environment and of public health**. Mr. Mamère also has been speaking in his capacity as an **elected representative** committed to ecological issues, so that his comments were to be regarded as **political or "militant" expression**. The Court reiterates that those who have been prosecuted on account of their comments on a matter of general concern should have the opportunity to absolve themselves of liability by establishing that they have **acted in good faith** and, in the case of **factual al-**

legations, by proving that they were true. In the applicant's case the comments in question were value judgments as well as factual allegations, so that the applicant should have been offered both those opportunities. As regards the factual allegations, since the acts criticised by the applicant had occurred more than ten years previously, the 1881 Freedom of the Press Act barred him from proving that his comments were true. While in general the Court could see the logic of such a time bar, it considered that where historical or scientific events were concerned, it might on the contrary be expected that over the course of time the debate would be enriched by new information that could **improve people's understanding of reality**. Furthermore, the Court is not persuaded by the French Court's reasoning concerning Mr. Mamère's lack of good faith and the insulting character of some of his statements. According to the European Court, Mr. Mamère's comments can be considered **sarcastic** but they remained **within the limits of acceptable exaggeration or provocation.** Furthermore, the question of Mr. Pellerin's personal and "institutional" liability was an integral part of the debate on a matter of general concern: as director of the SCPRI he had had access to the measures being taken and had on several occasions made use of the media to inform the public of the level of contamination, or rather, one might say, the lack of it, within the territory of France. In those circumstances, and having regard to the **extreme importance of the public debate** in which the comments in issue had been made, Mr. Mamère's conviction for defamation could not be said to have been proportionate and hence "necessary in a democratic society". The Court therefore holds that there has been a violation of Article 10.

52.- Case of Leempoel and SA Ciné Télé Revue v. Belgium, 9 November 2006 (court order, withdrawal from sale and ban on distribution of issue of weekly magazine, privacy, confidentiality, criticizing a judge, (no) contribution to public debate, art. 53 ECHR)

In a judgment of 9 November 2006 the Strasbourg Court found no violation of the freedom of expression in a case concerning the withdrawal from sale and ban on distribution of an issue of the Belgian weekly magazine *Ciné Télé Revue.* On 30 January 1997 the magazine published an article containing extracts from the preparatory file and personal notes which an investigating judge, D., had handed to a parliamentary commission of inquiry. The article was advertised on the front cover of the magazine by the headline, superimposed on a photograph of the judge. The disclosures received substantial press coverage, as the issue was related to the "Dutroux-case" and how the police and the judiciary had handled the investigations with regard the disappearance, kidnapping, sexual abuse and murdering of several children.
On an application by investigating judge D., the urgent-applications judge in Brussels ordered the magazine editor and its publisher to take all necessary steps to remove every copy of the magazine from sales outlets and prohibited the subsequent distributing of any copy featuring the same cover and the same article, holding that the documents that had been published were subject to the rules on **confidentiality of parliamentary inquiries** and that their publication appeared to have breached the right to due process and also the judge's right to respect for her **private life**.

In an application before the Strasbourg Court of Human Rights, the applicants complained that the ruling against them infringed Article 10 of the Convention and they maintained that Article 25 of the Belgian Constitution, which forbids censorship of the press, afforded a greater degree of protection than Article 10 of the Convention and that its application should accordingly have been safeguarded by Article 53 of the Convention (the Conventions rights and freedoms being "minimum rules").

The Court noted that **although the offending article was related to a subject of public interest, its content could not be considered as serving the public interest**. Moreover, the parliamentary commission's hearings had already received **a major media exposure**, also live on television. The Court found that the article in question contained criticism that was especially directed against the judge's character and that it contained in particular a **copy of strictly confidential correspondence** which could not be regarded as contributing in any way to a debate of general interest to society. The use of the file handed over to the commission of inquiry and the comments made in the article had revealed the very essence of the "system of defence" that the judge had allegedly adopted or could have adopted before the commission. The Court is of the opinion that the adoption of such a "system of defence" belonged to the "inner circle" of a person's **private life** and that the confidentiality

of such personal information had to be guaranteed and protected against any intrusion. As the Court found that the article in question and its distribution **could not be regarded as having contributed to any debate of general interest to society** it considered that the grounds given by the Belgian courts to justify the ban of the distribution of the litigious issue of the magazine were relevant and sufficient and that the interference with the applicants' right to freedom of expression was proportionate to the aim pursued. The Court considered that such interference could be seen as "necessary in a democratic society" and did not amount to a violation of Article 10.
With regard the alleged neglect of application of Article 53, the Court referred back to its finding that the interference in question had been "prescribed by law" and further observed that **the decision to withdraw the magazine from circulation did not constitute a pre-publication measure** but, having been taken under the urgent-applications procedure, sought to limit the extent of damage already caused. As such an interference was not considered by the Belgian Court of Cassation as a form of censorship, the European Court did not consider it necessary to examine separately the complaint under Article 53 based on an alleged breach of Article 25 of the Belgian Constitution.

53.- Case of Österreichischer Rundfunk v. Austria, 7 December 2006 (prohibition to show picture on television, ORF as "victim", politician convicted for crime with a clear political relevance, injunction in broad terms)

This case concerns a reaction in respect of a **news item** on the Austrian public television channel, ORF (*Österreichischer Rundfunk*). In a news program on ORF in 1999, **a picture** was shown of a person, Mr. S, who a few weeks before had been released on parole. Mr. S. had been convicted to eight years' imprisonment in 1995 because he was found to be **a leading member of a neo-Nazi organisation**. On request of Mr. S. the Austrian courts prohibited ORF from showing Mr. S.'s picture in connection with any report stating that he had been convicted under the National Socialist Prohibition Act (*Verbotsgezetz*, Prohibition Act) once the sentence had been executed or once he had been released on parole. The courts found that the publication of the picture of Mr. S. in that context had violated his legitimate interests within the meaning of both Section 78 of the Copyright Act and Section 7a of the Media Act ('right of one's image').

The ORF complained in Strasbourg that the Austrian courts' decisions violated its right to freedom of expression as provided in Article 10 of the European Convention on Human Rights. Although being a public broadcasting organisation, the Court is of the opinion that **ORF is not to be qualified as a governmental organisation and hence is in a position to claim to be a 'victim' of an interference by the Austrian authorities in its right of freedom of expression**, within the meaning of the articles 34 and 35 of the Convention. The Court is of the opinion that the ORF is not resorting under government control, *inter alia* referring to the guarantee of editorial and journalistic independence of the ORF and its institutional autonomy as a provider of a public service. With regard the question whether the prohibition to show Mr. S's. picture relating to his conviction under the Prohibition Act, the Court takes into account several elements: the Court refers to the position of the ORF as a public broadcaster with an obligation for cover any major news item in the field of politics, to the position of Mr. S. as a well-known member of the neo-Nazi scene in Austria and to the nature and subject matter of the news report, being **a news item concerning an issue of public interest**. The Court furthermore underlines the circumstance that the injunction granted by the domestic courts was phrased in very broad terms and that the news item on ORF referred to persons recently released on parole after having been **convicted for crime with a clear political relevance**. Taking into account all these elements the Strasbourg Court finds that the reasons adduced by the Austrian courts to legitimate the injunction were not relevant and sufficient to justify the interference in the freedom of expression of ORF. There has accordingly been a violation of Article 10.

(See also Radio France a.o. v. France, 30 March 2004)

54.- Case of Radio Twist v. Slovakia, 19 December 2006 (Radio station, illegally obtained telephone conversation between two politicians, protection of privacy, relevance, injunction in broad terms)

In this case the applicant, *Radio Twist,* is a radio broadcasting company that was convicted for broadcasting in a news programme the recording

of a telephone conversation between the State Secretary at the Ministry of Justice and the Deputy Prime Minister. The recording was accompanied by a commentary, clarifying that the recorded dialogue related to a politically influenced power struggle in June 1996 between two groups which had an interest in the privatisation of a major national insurance provider. Mr. D., the Secretary at the Ministry of Justice subsequently filed a civil action against *Radio Twist* for **protection of his personal integrity.** He argued that *Radio Twist* had broadcast the telephone conversation despite the fact that it had been obtained in an illegal manner. *Radio Twist* was ordered by the Slovakian courts to offer Mr. D. a written apology and to broadcast that apology within 15 days. The broadcasting company was also ordered to pay compensation for damage of a non-pecuniary nature, as the Slovakian courts considered the dignity and reputation of Mr. D. as a public official tarnished. Especially the broadcasting of the illegally tapped conversation was considered as an unjustified interference in the personal rights of Mr. D., as the protection of privacy also extends to telephone conversations of public officials.

The Strasbourg Court however disagrees with these findings by the Slovakian Courts. Referring to the general principles that the European Court of Human Rights has developed in its case law regarding freedom of expression in political matters, regarding the essential function of the press in a democratic society and regarding the limits of acceptable criticism of politicians, the Court emphasizes that the **context and content of the recorded conversation was clearly political** and that the recording and commentary **contained no aspects of any private-life dimension** of the politicians concerned. Furthermore the Court refers to the fact that the news reporting by *Radio Twist* did not contain untrue of distorted information and that **the reputation of Mr. D. seemed not to have been tarnished** by the impugned broadcast, as he was shortly later elected as a judge of the Constitutional Court. The Court points out that *Radio Twist* was sanctioned mainly for the mere fact of having broadcast information which someone else had obtained illegally and had forwarded to the radio station. **The Court is however not convinced that the mere fact that the recording had been obtained by a third person contrary to the law could deprive the broadcasting company which broadcast it of the protection of Article 10 of the Convention**. The Court also notes that at no stage it was alleged that the broadcasting company or its employees or agents were in any way liable for the recording or that its journalists transgressed the criminal law when obtaining or broadcasting it. The Court observes that there is **no indication that the journalists of *Radio Twist* acted in bad faith or that they pursued any objective other than reporting on matters which they felt obliged to make available to the public**. For these reasons the Court comes to the conclusion that by broadcasting the telephone conversation in question, *Radio Twist* did not interfere with the reputation and rights of Mr. D. in a manner that could justify the sanction imposed on it. Hence the interference with its rights to impart information did not correspond to a pressing social need. The interference being not necessary in a democratic society amounted to a violation of Article 10 of the Convention.

55.- Case of Vereinigung Bildender Künstler v. Austria, 25 January 2007 (satire, caricature, painting, sexual context, debasement, injunction)

In this case the Strasbourg Court considered the conviction of an association of artists a violation of the freedom of expression guaranteed by Article 10 of the Convention. The association, *Vereinigung Bildender Künstler Wiener Secession*, had organised in 1998 an exhibition entitled "The century of artistic freedom". One painting entitled "Apocalypse", made by the Austrian painter Otto Mühl, was a collage of 34 public figures, who all where portrayed naked and involved in sexual activities. Among those portrayed was Mr. Meischberger, a former general secretary of the Austrian Freedom Party (FPÖ) and at the time a member of the National Assembly. Mr. Meischberger was shown gripping the ejaculating penis of Mr. Jörg Haider (FPÖ) while at the same time being touched by two other FPÖ politicians and ejaculating on Mother Teresa.

The **painting** raised a lot of controversy and was ultimately vandalised by a visitor to the exhibition, who covered the part which showed Mr. Meischberger, among others, with red paint. Mr. Meischberger brought proceedings under Section 78 of the Austrian Copyright Act against the association, seeking an injunction prohibiting it from exhibiting and publishing the painting and requesting compensation. He argued that the painting debased him and his political activities. After the Vienna Commercial Court (*Handelsgericht*) dismissed Mr. Meischberger's ac-

tion, the Vienna Court of Appeal (*Oberlandesgericht*) found that the **painting constituted indeed a debasement of Mr. Meischberger's public standing and issued an injunction against the association prohibiting it from displaying the painting at exhibitions** and ordering it to pay EUR 1,450 in compensation and costs to Mr. Meischberger. The judgment was confirmed by the Supreme Court (*Oberster Gerichtshof*), considering that the Court of Appeal rightly had motivated why in this case the personal rights of Mr. Meischberger as protected by Article 78 of the Copyright Act prevailed over the artistic freedom protected by Article 17a of the Basic Law (*Staatsgrundgesetz*), because a picture of Mr. Meischberger has been used in a degrading and insulting manner.

The European Court of Human Rights could not agree with the findings by the Vienna Court of Appeal and the Supreme Court, as it considered the **painting, seen in its context, as protected under the right of freedom of expression**. The Court noted first of all that the painting, in its original state, depicted Mr. Meischberger in a somewhat outrageous manner, but that the figures of the painting were **caricatures and the painting satirical**. According to the Court, satire is to be considered a form of artistic expression and social comment which, by **exaggerating and distorting reality, is intentionally provocative.** The Court is of the opinion that **the painting did not concern Mr. Meischberger's private life**, but his public standing as a politician. The scene in which he was portrayed could be understood to constitute some sort of counter-attack against the Austrian Freedom Party, whose members had strongly criticised the painter's work. The Court also observes that, even before Mr. Meischberger brought proceedings, the part of the painting showing his body was completely covered by red paint. From that time onwards, Mr Meischberger's portrayal – even assuming that he was still recognisable – was certainly diminished, if not totally eclipsed, by the portrayal of all the other, mostly more prominent, people who were still completely visible. The Court lastly noted that the Austrian courts' **injunction was not limited either in time or in space**. It therefore left the association of artists, which directed one of the best-known Austrian galleries specialising in contemporary art, with no possibility of exhibiting the painting, irrespective of whether Mr. Meischberger was known, or was still known, at the place and time of a potential exhibition in the future. The Court concluded that the Austrian courts' injunction was disproportionate to the aim pursued and therefore not necessary in a democratic society, in violation of Article 10.

With this approach the majority of the Court rejected the firm arguments developed in the **dissenting opinions** by the Cypriot, the Norwegian and the Luxemburg judge, who considered the painting "senseless", containing "disgusted images", with "repulsive sexual poses, some even involving violence", being manifestly "insulting" and "undermining the reputation or dignity of others". The dissenters emphasized that freedom of expression cannot be unlimited, especially when it interferes excessively with the right of others. The excessive nature of the portrayal resulted from its attack on the dignity of others, a concept that prevails throughout the European Convention on Human Rights. One of the dissenting opinions also emphasized that "nobody can rely on the fact that he is an artist or that a work is a painting in order to escape liability for insulting others". The **majority of the Court** however, without recognising an *'exception artis'*, underlined that the pictures were painted in an unrealistic and exaggerated matter which amounted to a caricature of the persons concerned using satirical elements.

This controversial case has produced a controversial judgment. By four votes to three the Court came to the conclusion that there has been a violation of Article 10 of the Convention. The judgment is an important moral and legal support however for artists and cartoonists producing satirical works, **satire in the wording of the Court being "a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate".** Accordingly any interference with an artist's right to such expression must be examined with particular care, as the Court demonstrated in its judgment of 25 January 2007.

56.- Case of Tønsbergs Blad and Haukom v. Norway, 1 March 2007 (defamation, public figure, issue of public interest, ethics of journalism, costs, compensation for damages)

In 2000 *Tønsbergs Blad* published an article about a list drafted by the Municipal Council of Tjøme identifying property owners suspected of failing to respect the permanent residence requirement applying to certain properties, in breach of local regulations. The article referred to a well-known

singer and a well-known business man (Mr. Rygh) stating that they might be "forced to sell their properties at Tjøme". The article included a small photo of Mr. Rygh with the caption: "it must be due to a misunderstanding, says Tom Vidar Rygh". Few weeks later, after being informed that the Rygh family's property had been removed from the list, the newspaper published an additional article which noted that Mr. Vidar Rygh and the singer had "got off" of the list. The newspaper criticized that there were "major loopholes" in the system, in that the regulations did not apply to houses which had been built by the owners. In a further article, entitled "*Tønsbergs Blad* clarifies", the paper stated that the properties belonging to the singer and the Rygh family had been removed from the list in question, as the regulations did not apply to their properties.

Mr. Rygh brought private criminal proceedings against the newspaper and its editor-in-chief, Mrs. Haukom. Under Article 253 of the Penal Code (defamation), the High Court (*lagmannsrett*) declared the impugned statements null and void and ordered the publishing firm and the editor-in-chief to pay Mr. Rygh NOK 50,000 in compensation for non-pecuniary damage. The Court was of the opinion that there had not been sufficient evidence for the allegations against Mr. Rygh. The Supreme Court upheld the conviction and ordered *Tønsbergs Blad* and Haukom to pay Mr Rygh NOK 673,879 for costs.

Before the European Court of Human Rights, *Tønsbergs Blad* and Haukom complained under Article 10 of the Convention that the Norwegian Courts' decisions had entailed an interference with their right to freedom of expression that could not be regarded as necessary in a democratic society. The Strasbourg Court in the first place found that the purpose of the article was to illustrate **a problem that the public had an interest in being informed about**. Indeed, a possible failure of a **public figure** to observe laws and regulations aimed at protecting serious public interests, even in the private sphere, might in certain circumstances constitute a matter of legitimate public interest. The Court recalled that protection of the right of journalists to impart information on issues of general interest required that they **act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism**. Even though the news item had been presented in a somewhat **sensationalist style**, the overall impression given by the newspaper report was that, rather than inviting the reader to reach any foregone conclusion about any failure on Mr. Rygh's part, it had raised question marks with respect to both whether he had breached the requirements in question and whether those requirements should be maintained, modified or repealed. The Strasbourg Court is of the opinion that the overall news coverage by *Tønsbergs Blad* on that matter was **presented in a balanced way** and that the disputed allegations were presented with precautionary qualifications. The Court does not find that the impugned accusation was capable of causing such injury to personal reputation as could weigh heavily in the balancing exercise to be carried out under the necessity test in Article 10 § 2 of the Convention. As to the further question whether the applicants had acted in good faith and complied with the ordinary journalistic obligation to verify a factual allegation, the European Court found **substantial evidence** to corroborate the newspaper's contention that the Municipality at the time held the view that Mr. Rygh was in breach of the relevant residence requirements. The journalist could not in the Court's opinion be blamed for not having ascertained for himself, whether the residence requirements were applicable to the property used by Mr. Rygh. On the contrary, in view of the relatively minor nature and **limited degree of the defamation** at issue and the **important public interests involved**, the Court was satisfied that the newspaper had taken sufficient steps to verify the truth of the disputed allegation and acted in good faith. Yet the applicants had had to face judicial defamation proceedings pursued at three levels. These proceedings had led to their statements being declared null and void and their being ordered to pay the plaintiff NOK 50,000 in compensation for non-pecuniary damage and to reimburse him NOK 673,829 for his legal expenses, in addition to bearing their own costs. In the circumstances, **the proceedings had resulted in an excessive and disproportionate burden being placed on the applicants**, which was capable of having a **chilling effect on press freedom** in the respondent State. The Strasbourg Court came to the conclusion that the reasons relied on by the Norwegian authorities, although relevant, were not sufficient to show that the interference complained of had been "necessary in a democratic society". The Court considered that there had been no reasonable relationship of proportionality between the restrictions placed by the measures applied by the Supreme Court on the applicants' right to freedom of expression and the legitimate aim pursued. Accordingly, there

has been a violation of Article 10 of the Convention.

57.- Case of Colaço Mestre and Sociedade Independente de Comunicação (SIC) v. Portugal, 26 April 2007 (defamation, television interview, allegations of bribery in football, damages, journalistic ethics)

In 1996, as part of a television programme entitled *Os donos da bola* (masters of the ball), SCI (the TV channel of SIC) broadcast an interview conducted by Mr. Colaço Mestre with Gerhard Aigner, who at the time was General Secretary of UEFA. The interview, in French, focussed on allegations concerning bribery of referees in Portugal and the actions of Mr. Pinto da Costa, the then President of the Portuguese Professional Football League and Chairman of the football club FC Porto. Mr. Colaço Mestre described Mr. Pinto da Costa as "the referees' boss" and seemed to be eliciting comments from his interviewee about the concurrent functions exercised by Mr. Pinto da Costa at the time. Mr. Pinto da Costa lodged a criminal complaint against Mestre and SIC accusing them of defamation. The Oporto Criminal Court sentenced Mr. Colaço Mestre to a fine or an alternative 86-day term of imprisonment, and ordered the journalist and the television channel to pay the claimant damages of approximately EUR 3,990. In 2002 the Oporto Court of Appeal dismissed an appeal lodged by Mestre and SIC and upheld their conviction

The European Court of Human Right however is of the opinion that this sanction was a breach of Article 10 of the Convention. The Court noted that Mr. Pinto da Costa played a major role in Portuguese public life and that the **interview concerned the debate on bribery in football**, a question of **public interest**. Moreover, the interview **had not concerned the private life** but solely the public activities of Mr. Pinto da Costa as Chairman of a leading football club and President of the National League. As to the expressions used during the interview, the Court considered that there had been **no breach of journalistic ethics.** In the context of the **heated debate** at the time about bribery of Portuguese referees the interview had been broadcast in a Portuguese football programme intended for an audience with a particular interest in and knowledge of the subject-matter. The Court further considered that the fact that Mr. Colaço Mestre had not been speaking in his mother tongue, when he conducted the interview with the UEFA-Secretary General, might have had an impact on the wording of his questions. The Court also found that the punishment of a journalist by sentencing him to pay a fine, together with an award of damages against him and the television channel employing him, might **seriously hamper the contribution of the press to discussion of matters of public interest** and should not be envisaged unless there were particularly strong reasons for doing so. However, that was not the case here. In those circumstances the Court considered that, whilst the reasons advanced by the Portuguese courts to justify the applicants' conviction might be regarded as relevant, they were not sufficient and, accordingly, did not serve to meet a pressing social need. The Court held, therefore, that there had been a violation of Article 10.

58.- Case of Dupuis a.o. v. France, 7 June 2007 (breach of professional secrecy, presumption of innocence, state affair, book, journalists, crime reporting, journalistic ethics)

In this judgment the Court unanimously is of the opinion that the French authorities have violated the freedom of expression of two journalists and a publisher (Fayard) of a book in 1996. Both journalists were convicted for using confidential information published in their book "The Ears of the President" (*Les Oreilles du President*). The book focussed on the "Elysée eavesdropping operations", an illegal system of telephone tapping and record-keeping, orchestrated by the highest office of the French State and directed against numerous figures from civil society, including journalists and lawyers. The French Courts found the two journalists, Dupuis and Pontaut, guilty of the offence of using information obtained trough a breach of the confidentiality of the investigation or of the professional confidentiality. It was also argued that the publication could be detriment for the presumption of innocence of Mr. G.M., the deputy director of President Mitterrand's private office at the material time, who was placed under formal investigation for breach of privacy under suspicion of being the responsible person for the illegal telephone tapping.

The European Court observes that the subject of the book concerned **a debate of considerable public interest, an affair of state, which was of interest to public opinion.** The Court also refers to the status of Mr. G.M. as a **public person**, clearly involved in political life at the highest level

of the executive while the public had a legitimate interest to be informed about the trial, and in particular, about the facts dealt with or revealed in the book. The Court finds it legitimate that special protection should be granted to the **confidentiality of the judicial investigation**, in view of the stakes of criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent. However, at the time when the book was published, the case had already undergone **wide media coverage** and it was already well known that Mr. G.M. had been placed under investigation in this case. Hence the Court is of the opinion that the protection of the information on account of its confidentiality did not constitute an overriding requirement. The Court also questions whether there was still an interest in keeping information confidential when it had already been at least partly made public and was likely to be widely known, having regard to the media coverage of the case. The Court further considers that it is necessary to take the greatest care in assessing the need to punish journalists for using information obtained through a breach of the confidentiality of an investigation or of professional confidentiality when those **journalists are contributing to a public debate of such importance, thereby playing their role as "watchdogs" of democracy.** According to the Court, the journalists had acted in accordance with the standards governing their profession as journalists, since the impugned publication was relevant not only to the subject matter but also to the credibility of the information supplied, providing evidence of its **accuracy and authenticity**. Lastly, the Court underlines that the interference with freedom of expression might have a chilling effect on the exercise of that freedom – an effect that the relatively moderate nature of the fine, as in the present case, would not suffice to negate. As the judgment against the two journalists had constituted a disproportionate interference with their right to freedom of expression it was therefore not necessary in a democratic society. Accordingly, there has been a violation of Article 10 of the Convention.

59.- Case of Hachette Filipacchi (Paris Match) v. France, 14 June 2007 (photograph of dead body, injunction to publish statement, privacy, human dignity, chilling effect, journalistic ethics)

After the Prefect of Corsica, Claude Erignac, was murdered in Ajaccio in February 1998, an issue of the weekly magazine *Paris-Match* contained an article entitled "La République assassinée" (The murdered Republic). **The article was illustrated by a photograph of the Prefect's body lying on the road, facing the camera**. The widow and children of Prefect Erignac sought injunctions against several companies, including the publishing company of *Paris-Match*, Hachette Filipacchi Associés. They contended that publication of the photograph of the **bloodied and mutilated body** of their relative was not information which could possibly be useful to the public, but was prompted purely by commercial considerations and constituted a particularly intolerable infringement of their right to respect for their private life. The urgent applications judge issued an injunction requiring the Hachette Filipacchi company to publish at its own expense in *Paris-Match* a statement informing readers that Mrs. Erignac and her children had found the photograph showing the dead body of Prefect Erignac published in *Paris-Match* deeply distressing. Few days later the Paris Court of Appeal upheld the injunction, noting, among other considerations, that publication of the photograph, while Prefect Erignac's close family were still mourning his loss, and given the fact that they had not given their consent, constituted a gross disturbance of their grief, and accordingly of the intimacy of their private life. It ruled that such a photograph infringed human dignity and ordered the Hachette Filipacchi company to publish at its own expense in *Paris-Match* a statement informing readers that the photograph had been published without the consent of the Erignac family, who considered its publication an intrusion into the intimacy of their private life. On 20 December 2000 the Court of Cassation dismissed an appeal on points of law by the applicant company.

Relying on Article 10, the publishing house of *Paris-Match* complained before the European Court of Human Rights of the injunction requiring it to publish, on pain of a coercive fine, a statement informing readers that the photograph had been published without the consent of the Erignac family. The Court considered that the obligation to publish a statement amounted to an interference by the authorities with the company's exercise of its freedom of expression. The Court noted that the practice of requiring publication of a statement was sanctioned by a long tradition of settled French case-law and was regarded by the French courts as "one of the ways of making good damage caused through the press." It considered that this case-law satisfied the conditions of accessibility and foreseeability

required for a finding that this form of interference was "**prescribed by law**" within the meaning of Article 10 § 2 of the Convention. The Court also considered that the interference complained of had pursued a legitimate aim (the protection of the rights of others) and it noted that the rights concerned fell within the scope of Article 8 of the Convention, guaranteeing the right to respect for private and family life. The crucial question which the Court had to answer was whether the interference had been "necessary in a democratic society", within the framework of duties and responsibilities inherent in exercise of the freedom of expression. In this respect the Court reiterated that the death of a close relative and the ensuing mourning, which were a source of intense grief, must sometimes lead the authorities to take the necessary measures to **ensure respect for the private and family lives** of the persons concerned. In the present case, the offending photograph had been published only few days after the murder and after the funeral. The Court considered that the distress of Mr. Erignac's close relatives **should have led journalists to exercise prudence and caution, given that he had died in violent circumstances which were traumatic for his family, who had expressly opposed publication of the photograph**. The result of publication, in a magazine with a very high circulation, had been to heighten the trauma felt by the victim's close relatives in the aftermath of the murder, so that they were justified in arguing that there had been an infringement of their right to respect for their private life. The Court also considered that the **wording of the statement *Paris-Match* had been ordered to publish**, revealed **the care the French courts had taken to respect the editorial freedom of *Paris-Match***. That being so, the Court considered that of all the sanctions which French legislation permitted, the order to publish the statement was the one which, both in principle and as regards its content, was the sanction entailing the least restrictions on exercise of the applicant company's rights. **It noted that the Hachette Filipacchi company had not shown in what way the order to publish the statement had actually had a dissuasive effect on the way *Paris-Match* had exercised and continued to exercise its right to freedom of expression**. In conclusion the Court considered that the order requiring *Paris-Match* to publish a statement, for which the French courts had given reasons which were both "relevant and sufficient", had been proportionate to the legitimate aim it pursued, and therefore "necessary in a democratic society". Accordingly, the Court held by 5 votes to 2 that there had been no violation of Article 10 of the European Convention on Human Rights. The two dissenting judges expressed their firm disagreement with the finding of the majority in two separate dissenting opinions, annexed to the judgment.

60.- Glas Nadezhda EOOD and Elenkov v. Bulgaria, 11 October 2007 (refusal to grant broadcasting licence, media authority, independence and transparency, judicial review)

In 2000 *Glas Nadezhda EOOD*, of which Mr. Elenkov is the manager, applied to the State Telecommunications Commission (the "STC") for a licence to set up a radio station to broadcast Christian programmes in and around Sofia. The STC refused to grant the licence, basing its refusal on the decision taken by the National Radio and Television Committee (the "NRTC") which found that, on the basis of the documents submitted by *Glas Nadezhda EOOD*, the proposed radio station would not meet its requirements to make social and business programmes or to target regional audiences. The proposals also failed to fully meet its requirements to produce original programmes, to ensure audience satisfaction and to provide the professional and technological resources required.

Glas Nadezhda EOOD brought proceedings before the Supreme Administrative Court for judicial review of both STC's and NRTC's decision, but finally the Court held that the NRTC had total discretion in assessing whether an application for a broadcasting licence had met certain criteria and that this discretion was not open to judicial scrutiny. In the meantime, Mr. Elenkov attempted to obtain a copy of the minutes of the NRTC's deliberations, which were meant to be available to the public under the Access to Public Information Act 2000. Despite his requests and a court order, Mr. Elenkov was not given access to those minutes.

Relying on Articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression), the applicants complained that they were refused a broadcasting licence. They also complained under Article 13 (right to an effective remedy) about the ensuing judicial review proceedings.

The Court is of the opinion that the interference in the freedom of expression of the applicants did not meet the requirements of lawfulnes as pre-

scribed by Article 10 § 2. The NRTC had not held any form of public hearing and its deliberations had been kept secret, despite a court order obliging it to provide the applicants with a copy of its minutes. Furthermore, the NRTC had merely stated in its decision that *Glas Nadezhda EOOD* had not or had only partially corresponded to a number of its criteria. No reasoning was given to explain why the NRTC came to that conclusion. And no redress had been given for that lack of reasoning in the ensuing judicial review proceedings because it had been held that the NRTC's discretion had not been reviewable. That, together with the NRTC's vagueness concerning certain criteria for programmes, had denied the applicants legal protection against **arbitrary interference with their freedom of expression**. The Court notes that the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for open and transparent application of the regulations governing the licensing procedure and specifically recommend that "[a]ll decisions taken... by the regulatory authorities... be... duly reasoned [and] open to review by the competent jurisdictions" (*Recommendation 2000/23 on the independence and functions of regulatory authorities for the broadcasting sector*). Consequently, the Court concludes that the interference with the applicants' freedom of expression had not been lawful and held that there had been a violation of Article 10.

Having regard to its findings under Article 10, the Court considers that it is not necessary to additionally examine whether there has been a violation of Article 9 of the Convention. The Court on the other hand comes to the conclusion that there has been a **violation of Article 13**. The Court observes that the Supreme Administrative Court made it clear that it could not scrutinise the manner in which that body had assessed the compliance of *Glas Nadezhda EOOD's* programme documents with the relevant criteria, that assessment being within the NRTC's discretionary powers. The Supreme Administrative Court thus refused to interfere with the exercise of NRTC's discretion on substantive grounds and did not examine the issues going to the merits of the applicants' Article 10 grievance. Referring to its case law in some similar cases, the Court concludes that the approach taken by the Supreme Administrative Court – refusing to interfere with the exercise of NRTC's discretion on substantive grounds – fell short of the requirements of Article 13 of the Convention.

61.- Lindon, Otchakovsky-Laurens and July v. France, 22 October 2007 – Grand Chamber (defamation of politician, freedom of artistic expression, political debate, hate speech), extract from press release ECtHR

Mr Lindon is a writer, Mr Otchakovsky-Laurens is the chairman of the board of directors of the publishing company P.O.L., and Mr July was the publication director of *Libération*. In August 1998 P.O.L. published a novel by Mr Lindon called *Le Procès de Jean-Marie Le Pen* ("Jean-Marie Le Pen on Trial"). The novel recounts the trial of a *Front National* militant, who, while putting up posters for his party with other militants, committed the cold-blooded murder of a young man of North African descent and admitted that it was a racist crime. The novel is based on real events and in particular the murders, in 1995, of Brahim Bouaram, a young Moroccan who was thrown into the River Seine by skinheads during a *Front National* march, and of Ibrahim Ali, a young Frenchman of Comorian origin who was killed in Marseilles by *Front National* militants. The novel raises questions about the responsibility of Mr Le Pen, Chairman of the *Front National*, for murders committed by militants, and about the effectiveness of strategies to combat the far right. Following the publication of the novel, the *Front National* and Mr Le Pen brought defamation proceedings against Mr Lindon and Mr Otchakovsky-Laurens.

On 11 October 1999 Paris Criminal Court convicted Mr Otchakovsky-Laurens of defamation and Mr Lindon of complicity in that offence. They were each fined the equivalent of 2,286.74 euros (EUR) and ordered to pay, jointly, EUR 3,811.23 in damages both to Mr Le Pen and the *Front National*. The court found four passages from the book to be defamatory:

1. that Mr Le Pen led "a gang of killers" and that "people would have voted for Al Capone too";
2. that the *Front National* used violence against anyone who left the party;
3. that behind each of Mr Le Pen's assertions "loomed the spectre of the worst abominations of the history of mankind"; and,
4. that he was a "vampire" who thrived on the "bitterness of his electorate, but sometimes also on their blood, like the blood of his enemies" and that he was a liar who used defamation against his opponents to deflect accusations away from himself.

On 16 November 1999 *Libération* published a petition signed by 97 contemporary writers in its column "Rebonds" to protest about the conviction of Mr Lindon and Mr Otchakovsky-Laurens. The petition disputed whether the passages in question were in fact defamatory and reproduced them verbatim. Mr July was subsequently summoned by the *Front National* and Mr Le Pen to appear before Paris Criminal Court, which, in a judgment of 7 September 2000, found him guilty of defamation and sentenced him to pay a fine equivalent to EUR 2,286.74 and EUR 3,811.23 in damages, for having reproduced the relevant passages from the novel.

In a judgment of 13 September 2000, on an appeal lodged by Mr Lindon and Mr Otchakovsky-Laurens, Paris Court of Appeal upheld their convictions in respect of three passages (1., 3. and 4. above). The court reasoned that the author had only sufficiently distanced himself from the views expressed in relation to passage no. 2; the other three passages had not been subjected to basic verification and were not sufficiently dispassionate. On 27 November 2001 a further appeal on points of law was dismissed by the Court of Cassation.

On 21 March 2001 Mr July's conviction was upheld by Paris Court of Appeal, which found that the authors of the petition had intended to show their support for Mr Lindon "by repeating with approval, out of defiance, all the passages that had been found defamatory by the court, and without even really calling into question the defamatory nature of the remarks". The court went on "its line of argument is built around reference to precise facts. There was therefore an obligation to carry out a meaningful investigation before making **particularly serious accusations such as incitement to commit murder**, and to avoid offensive expressions". On 3 April 2002 the Court of Cassation dismissed Mr July's appeal on points of law.

In a judgment given by the Grand Chamber of the ECtHR the complaints of Lindon, Otchakovsky-Laurens and July did not lead to a finding of a violation of Article 10 by the French authorities.

The Court found that applicants' convictions had a clear, legal basis (sections 29 and 32 of the Freedom of the Press Act of 29 July 1881). French case law indicated that Section 29 of the Act covered fiction, where the honour or reputation of a clearly identified individual was concerned. The European Court further found that their conviction pursued the legitimate aim of protecting the reputation or rights of others.

Concerning the writer and publisher

The Court reiterated that those who created or distributed a work, for example of a literary nature, contributed to the exchange of ideas and opinions which was essential for a democratic society. Hence the obligation on the State concerned not to encroach unduly on their freedom of expression. However, it appeared that the penalty imposed on Mr Lindon and Mr Otchakovsky-Laurens concerned, not the arguments expounded in the novel, but the content of certain passages. The Court recalled that novelists, other creators and anyone exercising freedom of expression had duties and responsibilities.

The domestic courts' view on whether the passages in question were defamatory could not be criticised in view of the virulent content of those passages and the fact that they specifically named the *Front National* and its chairman. It was also apparent that it was for the author's benefit that the Court of Appeal sought to determine those remarks from which the author really distanced himself in his work. As a result, the court found that one of the four passages was not defamatory.

The Court of Appeal's findings that the three passages had not been subjected to basic verification was in line with the European Court's case-law. In order to assess the justification of a statement, a distinction needed to be made between statements of fact and value judgments. While the existence of facts could be demonstrated, the truth of value judgments was not susceptible of proof. Even where a statement amounted to a value judgment, however, there had to exist a sufficient factual basis to support it. Generally speaking there was no need to make that distinction when dealing with extracts from a novel. It nevertheless became fully pertinent when, as in the applicants' case, the work in question was not one of pure fiction but introduced real characters or facts. It was all the more acceptable to require the applicants to show that the allegations contained in the passages from the novel that were found to be defamatory had a "sufficient factual basis" as they were not merely value judgments but also allegations of fact. Overall the Court considered that the Court of Appeal had adopted a measured approach and that it had made a reasonable assessment of the facts.

Having regard to the content of the offending passages, the Court also considered that the Court of Appeal's finding that they were not suf-

ficiently "dispassionate" was compatible with its case-law. It was true that, while an individual taking part in a public debate on a matter of general concern was required not to overstep certain limits as regards respect for the reputation and rights of others, he or she was allowed to have recourse to a degree of exaggeration or even provocation, or to make somewhat immoderate statements. It was also true that the limits of acceptable criticism were wider as regards a politician – or a political party – such as Mr Le Pen and the Front National – as such, than as regards a private individual. This was particularly true in the applicants' case as Mr Le Pen, a leading politician, was known for the virulence of his speech and his extremist views, on account of which he had been convicted a number of times on charges of incitement to racial hatred, trivialising crimes against humanity, making allowances for atrocities, apologia for war crimes, proffering insults against public figures and making offensive remarks. As a result, he had exposed himself to harsh criticism and had therefore to display a particularly high degree of tolerance in that context.

The Court nevertheless considered that the Court of Appeal made a reasonable assessment of the facts in the applicants' case in finding that to liken an individual, though he be a politician, to the leader of "a gang of killers", to assert that a murder, even one committed by a fictional character, was "advocated" by him, and to describe him as a "vampire who thrives on the bitterness of his electorate, but sometimes also on their blood", "oversteps the permissible limits in such matters".
Considering that those involved in political struggles should show **a minimum degree of moderation and propriety,** the Court also noted that the passages were such as **to stir up violence and hatred, going beyond what was tolerable in political debate, even in respect of a figure who occupied an extremist position in the political spectrum.** The Court therefore found that the "penalty" imposed on the applicants was based on "relevant and sufficient" reasons. The amount of the fine was also moderate. The Court concluded that the measures taken against the applicants were not disproportionate to the legitimate aim pursued and that the interference with the applicants' right to freedom of expression was necessary in a democratic society.

Concerning the newspaper

It appeared to the Court that Mr July was convicted because Libération had published a petition which reproduced extracts from the novel containing "particularly serious allegations" and offensive remarks, and whose signatories, repeating those allegations and remarks with approval, denied that the extracts were defamatory in spite of a finding to that effect against Mr Lindon and Mr Otchakovsky-Laurens.

The Court reiterated that protection of the right of journalists to impart information on issues of general interest required that they act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism. Freedom of expression carried with it "duties and responsibilities", which also applied to the media even with respect to matters of serious public concern. Moreover, those "duties and responsibilities" were liable to assume significance when there was a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds were required before the media could be dispensed from their ordinary obligation to verify factual statements that were defamatory of private individuals.

Having regard to the moderate nature of the fine and the damages that Mr July was ordered to pay, to the content of the passages and to the potential impact on the public of the remarks found to be defamatory on account of their publication by a national daily newspaper with a large circulation, the Court found that the interference was proportionate to the aim pursued. The Court concluded that the domestic court could reasonably find that the interference with the exercise by the applicant of his right to freedom of expression was necessary in a democratic society, in order to **protect the reputation and rights of Mr Le Pen and the *Front National*.**
There had therefore been no violation of Article 10 concerning any of the applicants.

In a (remarkable) dissenting opinion, three judges sharply disagree with the reasoning and findings of the majority of the Court. The dissenters are of the opinion that by seeking to ascertain the author's thoughts from the remarks of fictional characters in a fictional situation, the French Court of Appeal imprisoned literature in a set of rigid rules at odds with the freedom of artistic creation and expression. In their view such a radical position represents a clear departure from the case-law of the ECtHR, which has laid emphasis on the role of artistic creation in political debate. The dissenters also emphasize that by endorsing — or even paraphrasing — the

reasoning given by the domestic courts, adhering to the logic they themselves adopted, the European Court in its judgment has quite simply refrained from carrying out its own review. The result is that European supervision is lacking, or is at best considerably limited, and this again represents a significant departure from the case-law of the ECtHR in matters of criticism of politicians. As regards Mr Jean-Marie Le Pen, it is argued by the dissenters that he should accept an even higher degree of tolerance being critisised precisely because he is a politician who is known for the virulence of his discourse and for his extremist views. It is clear in their view that the insulting allegations had a sufficient factual basis, as they could easily be derived from Mr J.-M. Le Pen's various convictions throughout his political career, particularly for the following offences: "trivialisation of crimes against humanity, making allowances for atrocities". The dissenters also believe that it is excessive and inaccurate to claim that the novel in question constitutes an appeal to violence or hatred. The work criticises a politician who is himself inclined to make comments of such a nature, as shown by the convictions pronounced against him. In the present case, the expressions "chief of a gang of killers" (p. 10) and "a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood" (p. 136) cannot be taken literally; their intention is to convey the message that this politician, through his discourse, encourages his followers to engage in acts of extreme violence, especially against minorities, as the Bouaram case itself showed. In this sense, these expressions are also value judgments which have an established factual basis. Finally with regard the conviction of Serge July, the dissenters emphasize that it cannot be argued that, by simply reporting in the newspaper Libération *on the support of 97 writers for Mathieu Lindon and by publishing their opinion that the impugned passages were not defamatory, July had failed in his duty to act in good faith.*

62.- Voskuil v. the Netherlands, 22 November 2007 and Tillack v. Belgium, 27 November 2007 (protection of journalistic sources)

In two judgments the ECtHR has given substantial protection to the journalists' protection of sources under Article 10 of the Convention. The case of *Voskuil v. the Netherlands* concerns Mr Voskuil's allegations that he was denied the right not to disclose his source for two articles he had written for the newspaper *Sp!ts* and that he was detained for more than two weeks in an attempt to compel him to do so. Voskuil had been summoned to appear as a witness for the defence in the appeal proceedings concerning three individuals accused of arms trafficking. The court ordered the journalist to reveal the identity of a source in the interests of those accused and the integrity of the police and judicial authorities. Voskuil invoked his right to remain silent (*zwijgrecht*) and subsequently, the court ordered his immediate detention. Only two weeks later the Court of Appeal decided to lift the order for the applicant's detention. It considered that the report published by the applicant was implausible and that the statement of Voskuil was no longer of any interest in the proceedings concerning the arms trafficking. In Strasbourg Voskuil complained of a violation of his right of freedom of expression and press freedom under Article 10 of the Convention. The European Court recalled that the protection of a journalist's sources is one of the basic conditions for freedom of the press, as reflected in various international instruments including the Council of Europe's Committee of Ministers Recommendation No. R (2000) 7. Without such protection, sources might be deterred from assisting the press in informing the public on matters of public interest and, as a result, the vital public-watchdog role of the press might be undermined. The order to disclose a source can only be justified by an overriding requirement in the public interest. In essence the Court was struck by the lengths to which the Netherlands authorities had been prepared to go to learn the source's identity. **Such far-reaching measures could but discourage those who had true and accurate information relating to wrongdoing from coming forward in the future and sharing their knowledge with the press**. The Court found that the Government's interest in knowing the identity of the journalist's source had not been sufficient to override the journalist's interest in concealing it. There had therefore been a violation of Article 10.

The other case concerns the journalist H.M. Tillack complaining of a violation by the Belgian authorities of this right of protection of sources. Tillack, a journalist working in Brussels for the weekly magazine *Stern*, has been suspected of having bribed a civil servant by paying him EUR 8,000 in exchange for confidential information concerning investigations in progress in the European institutions. The European Anti-Fraud Office OLAF opened **an investigation in order to identify the informant of Tillack**. After the investigation by OLAF failed to unmask the official at the origin of the leaks, the Belgian judicial authorities where requested to open an investigation in this case regarding an alleged breach of professional confidence and bribery involving a civil servant. On 19 March 2004 Tillack's home

and workplace were **searched and almost all his working papers and tools were seized** and placed under seal (16 crates of papers, two boxes of files, two computers, four mobile phones and a metal cabinet). Tillack lodged an application with the ECtHR, after the Belgian Supreme Court had rejected his complaint under Article 10 of the Convention. The European Court emphasized that a journalist's right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of **the right to information, to be treated with the utmost caution, even more so in the applicant's case, where he had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that he had not been charged.** The Court also took into account the amount of property seized and considered that although the reasons given by the Belgian courts were "relevant", they could not be considered "sufficient" to justify the impugned searches. The European Court accordingly found that there had been a violation of Article 10 of the Convention.

63.- Filatenko v. Russia, 6 December 2007 (critical questions, election period, television journalist, defamation)

In 2000 the journalist Aleksandr Grigoryevich Filatenko was convicted for defamation. The reason for the defamation proceedings was a critical question he formulated during a broadcast live show he was presenting as a journalist working for Tyva, the regional state television and radio broadcasting company in the Tyva Republic of the Russian Federation. The controversial question, based on a question raised by a viewer by phone, referred to an incident during which the Tyva Republic flag had been torn off a car which was campaigning in support of the Otechestvo Party candidate. It was a matter of disagreement as to how Filatenko had worded that question during the programme. The plaintiffs' version was that Filatenko had presented the incident as if the Tyva flag had been torn down and stamped on by people from the Edinstvo Campaign Headquarters. Filatenko denied having made any such allegation: he only admitted to having specified that the incident had taken place near the Edinstvo Campaign Headquarters. In the defamation proceedings brought against Filatenko and the broadcasting company by members of the Edinstvo Movement, the Kyzyl District Court accepted the plaintiffs' version of how the question had been worded. As the video recording of the show had been lost, the district court relied solely on witness testimonies confirming the plaintiff's version of Filatenko's wording of the question. Filatenko was found guilty of defamation and ordered to pay approximately EUR 347 compensation for damages, while Tyva was ordered to broadcast a rectification in the same time slot as the original show.
In a judgment of 6 December 2007 the European Court of Human Rights is of the opinion that this conviction and court order violate of Article 10 of the European Convention on Human Rights. The Court reiterates that, as a general rule, any opinions and information aired during an **electoral campaign** should be considered part of a debate on questions of public interest and that there is little scope under Article 10 for restrictions on such debate. Similarly, punishing a journalist for having worded a question in a certain way, thus seriously hampering the press' contribution to a matter of public interest, should not be envisaged unless there is particularly strong justification. Therefore, the timing (just before elections) and format of the show (live and aimed at encouraging lively political debate), necessitated very good reasons for any kind of restriction on its participants' freedom of expression. The European Court finds that the Russian courts have failed to make an acceptable assessment of the relevant facts and have not given sufficient reasons for finding that Filatenko's wording of the question had been defamatory. Furthermore, there has been no indication that the assumed allegation contained in Filatenko's question had represented an attack on anyone's personal reputation. The Court is also of the opinion that there could be no serious doubts about Filatenko's **good faith**. He had merely requested a reaction from the show's participants on an event of major public concern, without making any affirmations. According to the European Court Filatenko could not be criticised for having failed to verify facts, given the obvious constraints of **a live television show**, while a representative of the Edinstvo political movement had been present and invited to respond to the question. The Court therefore concluded that the interference with Filatenko's freedom of expression had not been sufficiently justified, and hence violated Article 10 of the Convention.

(*See also Makhmudov v. Russia, 26 July 2007; Dyuldin and Kislov v. Russia and Chemodurov v. Russia, 31 Au-*

gust 2007 and Dzhavadov v. Russia, 27 September 2007)

64.- Stoll v. Switzerland, 10 December 2007 – Grand Chamber (breach of confidence, matter of public interest, journalistic ethics, diplomatic relations, good/bad faith of journalist, sensationalism)

In December 1996 the Swiss ambassador to the United States drew up a "strategic document", classified as "confidential", concerning the possible strategies with regard the compensations due to Holocaust victims for unclaimed assets deposited in Swiss banks. The report was sent to the Federal Department of Foreign Affairs in Berne and to a limited list of other persons. Martin Stoll, a journalist working for *Sonntags-Zeitung*, also obtained a copy of this document, probably as a result of a breach of professional confidence by one of the persons who had received a copy of this strategic paper. Short time later the *Sonntags-Zeitung* published two articles by Martin Stoll, accompanied by extracts from the document. The next days also other newspapers published extracts from the report. In 1999 Stoll was sentenced to a fine of 800 Swiss francs (520 euros) for publishing "official confidential deliberations" within the meaning of Article 293 of the Criminal Code. This provision not only punishes the person who is responsible for the breach of confidence of official secrets, but also those who helped **as an accomplice to give publicity to such secrets**. The Swiss Press Council, to which the case also had been referred in the meantime, found that the way Stoll had focussed on the confidential report, by shortening the analysis and failing to place the report sufficiently in context, had irresponsibly made some extracts appear sensational and shocking. In a judgment of 25 April 2006, the Strasbourg Court of Human Rights held, by four votes to three, that the conviction of Stoll was to be considered as a breach of the journalist's freedom of expression as guaranteed by Article 10 of the Human Rights' Convention. For the Court it was crucial that the information contained in the report manifestly raised matters of public interest, that the role of the media as critic and watchdog also applies to matters of foreign and financial policy and that the protection of confidentiality of diplomatic relations, although a justified principle, could not be protected at any price. Furthermore, as Stoll had only been convicted because he published parts of the document in the newspaper, the European Court was of the opinion that the finding by the Swiss Press Council that he had neglected his professional ethics by focussing on some extracts in a sensationalist way, should not be taken into account to determine whether or not the publishing of the document was legitimate.

In a judgment of 10 December 2007 the Grand Chamber of the ECtHR has, by twelve votes to five, "overruled" this finding of a violation of Article 10. Although the Grand Chamber recognizes that the information contained in the ambassador's paper concerned matters of public interest and that the articles of Stoll were published in a context of an important public, impassioned debate in Switzerland with an international dimension, it is of the opinion that the disclosure of the ambassador's report was capable of **undermining the climate of discretion necessary to the successful conduct of diplomatic relations and of having negative repercussions on the negotiations being conducted by Switzerland**. The judgment underlines that the fact that Stoll did not act illegally himself by obtaining the leaked document is not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities: as a journalist he could not claim in good faith to be unaware that disclosure of the document in question was punishable under Article 293 of the Swiss Criminal Code. Finally the Court emphasizes that **the impugned articles were written and presented in a sensationalist style**, that they suggested inappropriately that the ambassador's remarks were anti-Semitic, that they were of **trivial nature and were also inaccurate and likely to mislead the reader**. Like the Swiss Press Council, the Court observes a number of shortcomings in the form of the published articles.The Court comes to the conclusion that the *"truncated and reductive form of the articles in question, which was liable to mislead the reader as to the ambassador's personality and abilities, considerably detracted from the importance of their contribution to the public debate"* and that there has been no violation of Article 10 of the Convention.

The five dissenting judges express the opinion that the majority decision is a *"dangerous and unjustified departure from the Court's well established case-law concerning the nature and vital importance of freedom of expression in democratic societies"*. The judgment of the Grand Chamber also contrasts remarkably with the principle enshrined in the 19 December 2006 Joint Declaration by the UN, OSCE, OAS and ACHPR according to which

"journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it".

65.- Guja v. Moldova, 12 February 2008 – Grand Chamber (protection of whistle blower, matter of public interest, conditions for protecting whistle blowing under Art. 10 Convention)

The ECtHR recently delivered a judgement on a very particular and interesting case, concerning the position of a **"whistle-blower"** who leaked two letters to the press and was subsequently dismissed. The Court held that the divulgence of the internal documents to the press was *in casu* protected by Article 10 of the Convention, which guarantees the right to freedom of expression, including the right to receive and impart information and ideas. The applicant, Mr. Guja, was Head of the Press Department of the Moldovan Prosecutor General's Office, before he was dismissed, on the grounds that he had handed over two secret letters to a newspaper and that, before doing so, he had failed to consult the heads of other departments of the Prosecutor General's Office, a behaviour which constituted a breach of the press department's internal regulations. Guja was of the opinion that the letters were not confidential and that, as they revealed that the Deputy Speaker of Parliament, Vadim Mişin, had exercised undue pressure on the Public Prosecutor's Office, he had acted in line with the President's anti-corruption drive and with the intention of creating a positive image of the Office. Guja brought a civil action against the Prosecutor General's Office seeking reinstatement, but his request failed. Relying on Article 10 of the Convention, he complained to the Strasbourg Court about his dismissal.

The European Court held that, given the particular circumstances of the case, external reporting, even to a newspaper, could be justified, as the case concerned the pressure by a high-ranking politician on pending criminal cases. At the same time, the Public Prosecutor had given the impression that he had succumbed to political pressure. The Court also referred to the reports of international non-governmental organisations (the International Commission of Jurists, Freedom House, and the Open Justice Initiative), which had expressed concern about the breakdown of the separation of powers and the lack of judicial independence in Moldova. **There is no doubt that these are very important matters in a democratic society, about which the public has a legitimate interest in being informed and which fall within the scope of political debate.** The Court considered that the public interest in the provision of information on undue pressure and wrongdoing within the Prosecutor's Office is so important in a democratic society, that it outweighs the interest in maintaining public confidence in the Prosecutor General's Office. **Open discussion of topics of public concern** is essential to democracy and it is of great importance if members of the public are discouraged from voicing their opinions on such matters. The Court, being of the opinion that Guja had acted in **good faith**, finally noted that it was the heaviest sanction possible (dismissal) that had been imposed on the applicant. The sanction not only had negative repercussions on the applicant's career, but could also have a **serious chilling effect** on other employees from the Prosecutor's Office and discourage them from reporting any misconduct. Moreover, in view of the media coverage of the applicant's case, the sanction could also have a chilling effect on other civil servants and employees.

Being mindful of the importance of the right to freedom of expression on matters of general interest, of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff, and having weighed up the other different interests involved in the applicant's case, the Court comes to the conclusion that the interference with the applicant's right to freedom of expression, in particular his right to impart information, was not "necessary in a democratic society". Accordingly, there has been a violation of Article 10 of the Convention.

(See also Kudeshkina v. Russia, 26 February 2009)

66.- Yalçin Küçük (n° 3) v. Turkey, 22 April 2008 (incitement to hatred and hostility, separatist propaganda, membership of armed group, interview on TV, antiterror, hate speech, no incitement to violence or armed resistance)

Once more the European Court of Human Rights has found a breach of freedom of expression by the Turkish authorities. Yalçýn Küçük, a university professor and a writer, was prosecuted on account of various speeches he gave and arti-

cles he wrote concerning the Kurdish question. In 1999, the Ankara State Security Court found him guilty of **inciting hatred and hostility**, of emitting separatist propaganda and of belonging to an armed group (art. 312 § 2 and art. 168 § 2 of the Criminal Code and art. 8 of the Antiterrorism Act nr. 3713). He was also convicted of assisting an armed group (art. 169 Criminal Code) on the basis of an interview for Med-TV in which Küçük had welcomed the PKK-leader Abdullah Öcalan as "Mister President" and had invited him to make a statement about the Kurdish question.

Küçük had to undergo a prison sentence of six years and six months and was ordered to pay a fine of EUR 1,300. Relying on Article 6 § 1 and Article 10 of the European Convention on Human Rights, he complained that the proceedings had been unfair and that his right to freedom of expression had been breached.

The European Court in its judgment of 22 April 2008 considered that the grounds adopted by the Turkish courts could not be regarded in themselves as sufficient to justify interference with Külçük's right to freedom of expression. While certain comments in the offending articles and speeches sought to justify separatism, which thus made them hostile in tone, taken as a whole **they did not, however, advocate the use of violence, armed resistance or an uprising and did not constitute hate speech**, which, in the Court's view, was the essential factor to be taken into consideration. One speech by Külçük, however, contained a sentence to be considered as incitement to violence and therefore could not invoke the protection guaranteed by Article 10 of the Convention.

The European Court, referring to the nature and the severity of the sanctions, found that Külçük's conviction as a whole had been disproportionate to the aims pursued and, accordingly, was not "necessary in a democratic society". The Court especially referred to the severity of the sentence of imprisonment for six years and six months. The Court held, unanimously, that there had been a violation of Article 10 and that it did not need to examine the complaints submitted under Article 6 of the Convention. It awarded Küçük EUR 3,000 in respect of non-pecuniary damage.

67.- Alithia Publishing Company Ltd. & Constantinides v. Cyprus, 22 May 2008 (defamation, journalistic ethics, malice, facts and value judgments, credibility and reliability of evidence, proof of allegations, accurate and reliable information)

This case concerns the complaint about defamation proceedings brought against Alithia Publishing Company Ltd, the publisher of the daily morning newspaper *Alithia* and its editor-in-chief, Alecos Constantinides. Both the publishing company and the editor-in-chief were found liable of defamation following the publication in *Alithia* of a series of articles which alleged that a former Minister of Defence, Mr Aloneftis, was corrupt. According to final judgment by the Supreme Court the articles not only imputed to Mr Aloneftis the commission of criminal offences but had disparaged his moral character by presenting him as an unscrupulous criminal driven purely by self-interest. The lack of supporting evidence and the seriousness of the defamatory allegations demonstrated the existence of malice on the part of the applicants as well as their intent to defame the former Minister. The facts on which the publications had been based were considered inaccurate and the defendants were considered to have acted in flagrant disregard of the requirement to verify the factual allegations they had published. The Supreme Court upheld the district court's judgment and the corresponding award of damages.

The European Court in its judgment of 22 May 2008 noted that the Cypriot courts had made a carefully balanced examination of the case against the applicants and had concluded that the applicants had not sufficiently proven their primarily factual allegations. Indeed, the domestic courts had found that the applicants had acted maliciously and had blatantly disregarded the principles of responsible journalism. The Court found those findings persuasive in the circumstances and therefore held unanimously that there had been **no violation of Article 10**.

The Court notes that the domestic courts' imposition of a requirement on the press to act in good faith in order to provide accurate and reliable information is implicit in the protection of Article 10 of the Convention. This would equally apply in respect of **reports on matters of public interest**, even where such reports deal with the conduct of senior public officials acting in their official capacity. According to the European

Court the district court of the defendant state conducted an extensive analysis of the applicants' evidence and concluded that the **applicants had not in fact made sufficient effort to investigate the matters they alleged in their reports or to obtain and present the plaintiff's position on the relevant allegations**. It is held crucial in this regard that the evidence of the applicants was dismissed as unreliable and that both the district court and the Supreme Court agreed that the applicants had acted maliciously. The ECtHR does not see any reason to depart in this respect from the well-reasoned findings of the domestic courts, "which are, in any event, better placed to assess the credibility and reliability of the applicants' evidence". Given the **lack of good faith** on the part of the applicants, the ECtHR does not find it necessary to examine whether there were any special grounds in the present case for dispensing the applicants from their ordinary obligation to verify factual statements that were defamatory of private individuals or, indeed, public officials. The Court also considers that it is not, in principle, incompatible with Article 10 to place on a defendant in libel proceedings who wishes to rely on the defence of justification the onus of proving to the civil standard the truth of defamatory statements.

68. Meltex Ltd. and Mesrop Movsesyan v. Armenia, 17 June 2008 (refusal to grant broadcasting licence, independent media authority, guarantees against arbitrariness)

The European Court of Human Rights held unanimously that the refusal by the Armenian authorities on seven several occasions to grant the Meltex television company's requests for broadcasting licences, amounted to a violation of Article 10 of the European Convention on Human Rights. The Court firstly recognised that the independent broadcasting company Meltex was to be considered as **a 'victim' of an interference in its freedom of expression by the Armenian public authorities**: by not recognising the applicant company as the winner in the calls for tenders it competed in, the NTRC (*National Radio and Television Commission*) effectively refused the applicant company's bids for a broadcasting licence and such refusals do indeed constitute interferences with the applicant company's freedom to impart information and ideas. The Court also made clear that **States howsoever are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects and the grant of a licence may also be made conditional on such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments**. The compatibility of such interferences must be assessed in the light of the requirements of paragraph 2 of Article 10 of the Convention, which means *inter alia* that the interference must be prescribed by law in a way that guarantees protection against arbitrary interferences by public authorities. Indeed, the manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence (see also ECtHR 11 October 2007, Glas Nadezhda EOOD and Elenkov v. Bulgaria).

The Court noted that the NTRC's decisions had been based on the Broadcasting Act (2000) and other complementary legal acts, defining precise criteria for the NTRC to make its choice, such as the applicant company's finances and technical resources, its staff's experience and whether it produced predominately in-house, Armenian programmes. However, the **Broadcasting Act did not explicitly require at that time that the licensing body should give reasons when applying those criteria.** Therefore, the NTRC has simply announced the winning company without giving any reasons why that company had met the requisite criteria and why Meltex had not. There was no way of knowing on what basis the NTRC had exercised its discretion to refuse a licence. In this connection, the Court noted that the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for **open and transparent application** of the regulations governing the licensing procedure and specifically recommend that "all decisions taken ... by the regulatory authorities ... be ... duly reasoned" (Rec. (2000)23. See also Declaration of the Committee of Ministers of 26 March 2008 on the independence and functions of regulatory authorities for the broadcasting sector). The Court further took note of the relevant conclusions reached by the PACE in its Resolution of 27 January 2004 concerning Armenia, where it stated that "the vagueness of the law in force had resulted in the NTRC being given outright discretionary powers". The Court considered that **a licensing procedure**

whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression. The Court therefore concluded that the interference with Meltex' freedom to impart information and ideas, namely the seven denials of a broadcasting licence, had not met the requirement of lawfulness under the European Convention and hence violated Article 10 of the Convention.

69.- Flux (n° 6) v. Moldova, 29 July 2008 (journalistic ethics and lack of factual basis for defamatory allegations)

After several successful complaints before the Strasbourg Court of Human Rights related to freedom of critical journalistic reporting, this time the European Court by four votes to three came to the conclusion that the conviction of the Moldovan newspaper *Flux* was not to be considered as a violation of Article 10 of the Convention. The approach of the majority of the Court regarding the (lack of) journalistic ethical quality of the litigious articles published by *Flux* is strikingly different than the one of the dissenting judges.

In 2003 *Flux* published an article about a High School in Chisinău, sharply criticising its principal. The article merely quoted an **anonymous letter** it had received from a group of students' parents. The letter alleged *inter alia* that the school's principal used the school's funds for inappropriate purposes and that he had received bribes of up to 500 US dollars for enrolling children in the school. *Flux* **refused short time later to publish a reply from the school's principal**. The text of the reply was then published in another newspaper, the *Jurnal de Chisinău.* The reply expressed that *Flux* had published an anonymous letter without even visiting the school or conducting any form of investigation, which showed that its aim was purely sensationalism. It was said that *Flux* had acted contrary to journalistic ethics. *Flux* reacted to this reply by publishing a new article, **repeating some of the criticism published in the first article** and arguing that *Flux* would certainly find persons willing to testify in front of a court about the bribes. The principal then brought civil proceedings for defamation against *Flux* and the district court has found the allegations of bribery to be untrue and defamatory. The court stated that it had no reason to believe the three witnesses who had testified in court that bribes were taken for the enrolment of children in the school. The district court expressed the opinion that "*to be able to declare publicly that someone is accepting bribes, there is a need for a criminal-court decision finding that person guilty of bribery*". Since there was no such finding against the principal, he should not have been accused of bribery, according to the Moldovan district court. The judgment of the district court was confirmed by the Court of Appeal of Chisinâu and the appeal with the Supreme Court of Justice was dismissed. The newspaper was ordered to issue an apology and to pay the principal 1,350 Moldovan Lei (MDL), the equivalent of 88 euros (EUR) at the time.

Flux complained in Strasbourg under Article 10 of the Convention that the Moldovan courts' decisions had entailed interference with its right to freedom of expression that could not be regarded as necessary in a democratic society. The European Court in its judgment of 29 July 2008 attaches major importance to the fact that **despite the seriousness of the accusations of bribery the journalist of *Flux* who wrote the article made no attempt to contact the principal to ask his opinion on the matter nor conducted any form of investigation into the matters mentioned in the anonymous letter.** Furthermore a right of reply by the principal was refused by *Flux*, although the language used in this reply was not offensive. The new article in *Flux* as a reaction on the reply published in *Jurnal de Chisinău* is regarded by the Court as a form of reprisal for questioning the newspaper's professionalism. **The Court underlines however that it does not accept the reasoning of the district court, namely that the allegations of serious misconduct levelled against the principal of the school should have first been proved in criminal proceedings**. But the Court also makes clear that **the right to freedom of expression cannot be taken to confer on newspapers an absolute right to act in an irresponsible manner by charging individuals with criminal acts in the absence of a basis in fact at the material time and without offering them the possibility to counter the accusations**. As there are limits to the right to impart information to the public, a balance must be struck between that right and the rights of those injured, including the right to be presumed innocent of any criminal offence until proven guilty. The Court also refers to the **unprofessional behaviour of the newspaper** and the relatively modest award of damages which it was required to pay in the context of a civil action

and finds that the solution of the domestic courts struck a fair balance between the competing interests involved. The Court comes to the conclusion that the newspaper acted in **flagrant disregard of the duties of responsible journalism** and thus undermined the Convention rights of others, while the interference with the exercise of its right to freedom of expression was justified. On these grounds, the Court held by four votes to three that there has been **no violation of Article 10 of the Convention**.

The three dissenting judges in their joint dissenting opinion make clear however that they voted without hesitation in favour of a finding of a violation of Article 10. They argue that in this case the Court attached more value to professional behaviour of journalists than to the unveiling of corruption. According to the dissenters the facts show that the newspaper made enquiries about persistent rumours, found three witnesses whose integrity has not been put in doubt and who supported the allegations of corruption on oath. The dissenters underline that the Court has penalised the newspaper not for publishing untruths but for so-called 'unprofessional behaviour'. The dissenting opinions express the fear that this judgment of the Court has thrown the protection of freedom of expression as far back as it possibly could. And the dissenters continue: "*Even if alarming facts are sufficiently borne out by evidence, in the balancing exercise to establish proportionality, disregard for professional norms is deemed by Strasbourg to be more serious than the suppression of democratic debate on public corruption. To put it differently, in the Court's view the social need to fight poor journalism is more pressing than that of fighting rich corruption. The 'chilling effect' of sanctions against press freedom dreaded by the Court's old case-law has materialised through the Court's new one. (..) The serious inference of this judgment is that freedom of expression also ceases to exist when it is punished for pushing forward for public debate allegations of public criminality made by witnesses certified as credible but in a manner considered unprofessional. When subservience to professional good practice becomes more overriding than the search for truth itself it is a sad day for freedom of expression*".

70.- Leroy v. France, 2 October 2008 (incitement to terrorism, cartoon condoning terrorism)

In 2002 the French cartoonist Denis Leroy (pseudonym Guezmer) was convicted because of a cartoon published in a Basque weekly newspaper *Ekaitza*. On 11 September 2001 the cartoonist submitted to the magazine's editorial team a drawing representing the attack on the twin towers of the World Trade Centre, with a caption which parodied the advertising slogan of a famous brand: "*We have all dreamt of it... Hamas did it*" (Cfr. "Sony did it"). The drawing was published in the magazine on 13 September 2001. In its next issue, the magazine published extracts from letters and emails received in reaction to the drawing. It also published a reaction of the cartoonist himself, in which he explained that when he made the cartoon he was not taking into account the human suffering (*"la douleur humaine"*) caused by the attacks on WTC. He emphasized that his aim was to illustrate the decline of the US-symbols and he also underlined that cartoonists illustrating actual events do not have much time for distanced reflection: *"Quand un dessinateur réagit sur l'actualité, il n'a pas toujours le bénéfice du recul"*. He also explained that his real intention was governed by political and activist expression, namely that of communicating his anti-Americanism trough a satirical image and illustrating the decline of American imperialism.

The public prosecutor, on request of the regional governor, brought proceedings against the cartoonist and the newspaper's publishing director in application of Article 24, section 6 of the French Press Act of 1881 which penalizes apart from incitement to terrorism, also condoning (glorifying) terrorism: *'l'apologie du terrorisme'*. The publishing director was convicted for condoning terrorism, while Mr. Leroy was convicted for complicity in condoning terrorism. Both were ordered to pay a fine of EUR 1,500 each, to publish the judgment at their own expense in *Ekaitza* and in two other newspapers and to pay the costs of the proceedings. The Pau Court of Appeal held that "by making a direct allusion to the massive attacks on Manhattan, by attributing these attacks to a well-known terrorist organisation and by idealising this lethal project through the use of the verb 'to dream', [thus] unequivocally praising an act of death, the cartoonist justifies the use of terrorism, identifies himself through his use of the first person plural ("We") with this method of destruction, which is presented as the culmination of a dream and, finally, indirectly encourages the potential reader to evaluate positively the successful commission of a criminal act."

The cartoonist lodged an application with the European Court of Human Rights, relying on Article 10 of the Convention guaranteeing freedom of expression. Mr. Leroy complained that the French courts had denied his real intention,

which was governed by political and activist expression, namely that of communicating his anti-Americanism through a satirical image. Such an expression of an opinion, he argued, should be protected under Article 10 of the Convention. The Court considered that Mr. Leroy's conviction amounted indeed to an interference with the exercise of his right to freedom of expression. It **refused to apply Article 17 of the Convention (prohibition of abuse of rights) in this case, although the French government invoked this article arguing that the cartoon by glorifying terrorism** was to be considered as an act aimed at the destruction of the rights and freedoms guaranteed by the European Convention for the protection of Human Rights and that therefore the cartoonist could not rely at all on the freedom of expression guaranteed by this Convention. **The Court underlined that the message of the cartoon, - the destruction of US imperialism -, did not amount to a denial of the fundamental values of the Convention, in contrast e.g. with incitement to racism, anti-Semitism, Holocaust negationism and Islamophobia**. Hence in principle the cartoon was entitled to Article 10 protection. As the conviction of Mr. Leroy was prescribed by French law and pursued several legitimate aims, having regard to the sensitive nature of the fight against terrorism, namely the maintenance of public safely and the prevention of disorder and crime, it especially remained to be determined whether the interference by the French authorities was "necessary in a democratic society", according to Article 10 § 2 of the Convention.

The Court noted at the outset that the tragic events of 11 September 2001, which were at the origin of the impugned expression, had given rise to global chaos, and that the issues raised on that occasion were subject to **discussion as a matter of public interest. The Court however considered that the drawing was not limited to criticism of American imperialism, but supported and glorified the latter's violent destruction.** It based its finding on the caption which accompanied the drawing, and noted that the applicant had expressed his moral support for those whom he presumed to be the perpetrators of the attacks of 11 September 2001. Through his choice of language, the applicant commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims, as he submitted his drawing on the day of the attacks and it was published on 13 September 2001, with **no precautions on his part as to the language used.** In the Court's opinion, this factor - the date of publication - was such as to increase the cartoonist's responsibility in his account of, and even support for, a tragic event, whether considered from an artistic or a journalistic perspective. Also **the impact of such a message in a politically sensitive region**, namely the Basque Country, was not to be overlooked. According to the Court the cartoon had provoked a certain public reaction, capable of stirring up violence and demonstrating a plausible impact on public order in the region. All by all, the Court considered that the grounds put forward by the domestic courts in convicting Mr. Leroy had been "relevant and sufficient". Having regard to the modest nature of the fine and the context in which the impugned drawing had been published, the Court found that the measure imposed on the cartoonist had not been disproportionate to the legitimate aim pursued. Accordingly, there had not been a violation of Article 10 of the Convention.

71.- Petrina v. Romania, 14 October 2008 (right of privacy of public person, protection of reputation, lack of evidence of serious allegations)

In 1997, during a television programme that focussed on the problems on access to administrative documents stored in the archives of the former Romanian State security services, C.I., a journalist with the satirical weekly *Caţavencu*, affirmed that a politician, Liviu Petrina, had been active in the secret police *Securitate*. A few weeks later, the same journalist published an article reiterating his allegations. Similar allegations of collaboration by Petrina with the *Securitate* under the regime of Ceauşescu were also published by another journalist, M.D. Petrina lodged two sets of criminal proceedings against the journalists C.I. and M.D. for insult and defamation, but the two journalists were acquitted. The Romanian Courts referred to the European Court's case law regarding Article 10 of the Convention, guaranteeing the right of journalists to report on matters of public interest and to criticise politicians, esp. as the allegations expressed by the journalists had been general and indeterminate. A few years later however, a certificate was issued by the national research council for the archives of the State Security Department *Securitate* stating that Petrina was not among the people listed as having collaborated with the *Securitate.*

Following the acquittal of the two journalists by the Romanian Courts, Petrina complaint in

Strasbourg that his right to respect for his honour and his good name and reputation had been violated, **relying on Article 8 of the Convention** (right to respect for private and family life). **The Court accepted that the acquittal by the journalists could raise an issue under the positive obligations of the Romanian authorities to help to respect Petrina's privacy, including his good name and reputation.**

The European Court recognised that the discussion on the collaboration of politicians with the *Securitate* was a highly sensitive social and moral issue in the Romanian historical context. However, the Court found that in spite of the satirical character of *Caţavencu* and in spite of the mediatisation of the debate, the articles in question had been bound to offend Petrina, as there was no evidence at all that Petrina had ever belonged to the *Securitate*. It also considered that the allegations were very concrete and direct, and certainly not "general and undetermined" and with no ironic or humorous note whatsoever. **The Court did not believe that C.I. and M.D. could invoke in this case the right of journalists to exaggerate or provocate, as there was no factual basis at all for the allegations**. The journalists' allegations had overstepped the bounds of the acceptable, accusing Petrina of having belonged to a group that used repression and terror to serve the regime of Nikolai Ceauşescu.

Accordingly, the European Court was not at all convinced that the reasons given by the domestic courts to protect the freedom of expression (Article 10) were sufficient to take precedence over Petrina's reputation, as protected under Article 8 of the Convention. The Court found unanimously there has been **a violation of Article 8 of the Convention**. Petrina was awarded 5,000 EUR in respect of non-pecuniary, moral damages.

(See also Andreescu v. Romania, 8 June 2010)

72.- TV Vest SA and Rogaland Pensjonistparti v. Norway, 11 December 2008 (ban on political advertising, freedom of political expression, margin of appreciation)

On 11 December 2008 the European Court of Human Rights delivered an important judgment regarding a ban on political advertising on television. The crucial question the Court had to decide on was whether **a blanket ban of political advertisements on TV**, as it was applied in Norway, was to be considered 'necessary in a democratic society' from the scope of Article 10 of the European Convention on Human Rights. **In principle, there is little scope under Article 10 of the Convention for restrictions on political speech or on debate on questions of public interest**. However, a ban on paid political ad's on TV exists in many countries in Europe, such as in the UK, Sweden, Denmark, France, Belgium and Norway. According to art. 3, 1 (3) of the Norwegian Broadcasting Act 1992 broadcasters "*cannot transmit advertisements for life philosophy or political opinions through television*". The European Court decided unanimously that an application of this ban was in breach of Article 10 of the Convention.

The case goes back to the application by *TV Vest AS Ltd*., a television company in Stavanger, on the west coast of Norway, and the regional branch of a Norwegian political party, the Rogaland Pensioners Party (*Rogaland Pensjonistparti*). A fine was imposed on *TV Vest* for broadcasting adverts for the Pensioners Party, in breach of the Broadcasting Act. This fine had been imposed by the State Media Administration (*Statens medieforvaltning*) and had been confirmed by the Supreme Court (*Høyesterett*) which found, among other things, that allowing political parties and interest groups to advertise on television would give richer parties and groups more scope for marketing their opinions than their poorer counterparts. The Supreme Court also maintained that the Pensioners Party had many other means available to put across its message to the public. The Pensioners Party had argued that it was a small political party, representing only 1,3 % of the electorate, without powerful financial means or support from strong financial groups, that it seldom got any focus in editorial television broadcasting and thus had a real need to establish direct communication between itself and the electorate. The Party was never identified either in national or local opinion polls.

The European Court said to accept that the **lack of consensus in Europe regarding the necessity to ban political advertisements on TV**, spoke in favour of granting States greater discretion than would normally be allowed in decisions with regard to restrictions on political debate. The Court however came to the conclusion that the arguments in support of the prohibition in Norway, such as the **safeguarding of the quality of political debate, guaranteeing pluralism, maintaining the independence of broadcasters from political parties and preventing that**

powerful financial groups would take advantage having access to commercial political advertisements on TV, were relevant but **not sufficient** reasons to justify the total prohibition of this form of political advertising. The Court especially noted that the Pensioners Party did not come under the category of parties or groups that had been the primary targets of the prohibition. In contrast to the major political parties, which were given a large amount of attention in the edited television coverage, the Pensioners Party was hardly mentioned in Norwegian television. Therefore, **paid advertising on television became the only way for the Party to get its message across to the public through that type of medium.**

The Court was not persuaded that the ban had the desired effect and it explicitly rejected the view expounded by the Norwegian Government that there was no viable alternative to a blanket ban. In the Court's view there was **no reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means deployed to achieve that aim**. The restriction which the prohibition and the imposition of the fine entailed on the applicants' exercise of their freedom of expression cannot therefore be regarded as having been necessary in a democratic society. Accordingly, there has been a violation of Article 10 of the Convention.

It is obvious that the judgment of 11 December 2008 will initiate or renew the debate in many countries in Europe whether or not a ban on political advertising on television is still a legitimate restriction on freedom of political speech and access to paid political advertising.

73.- Khurshid Mustafa and Tarzibachi v. Sweden, 16 December 2008 (property rights, right to receive information, antenna installation, horizontal effect)

The applicants, Adnan Khurshid Mustafa, and his wife, Weldan Tarzibachi, are Swedish nationals of Iraqi origin. Relying on Article 10 (freedom to receive information) and Article 8 (right to respect for private and family life), they complained that they and their three children were forced to move from their rented flat in Rinkeby (a suburb of Stockholm) in June 2006. The reason of their eviction was their **refusal to remove a satellite dish in their flat after the landlord had initiated proceedings against them,** as he considered the installation of a satellite antenna as a breach of the tenancy agreement that stipulated that 'outdoor antennae' were not allowed to be set up on the house. The proceedings continued, also after Mr. Khursid Mustafa and Mrs. Tarzibachi had dismantled the outdoor antenna and replaced it by an antenna installation in the kitchen on an iron stand from which an arm, on which the satellite dish was mounted, extended through a small open window. Finally a **Swedish Court of Appeal had found that the tenants had disregarded the tenancy agreement and that they should dismantle the antenna, if not the tenancy agreement should not be prolonged.** The Swedish Court was of the opinion that the tenants were fully aware of the importance the landlord attached to the prohibition of the installation of satellite antennae and that although the installation in the kitchen did not pose a real safety threat, their interests to keep the antenna installation relying on their right to receive television programmes of their choice, could not be allowed to override the weighty and reasonable interest of the landlord that order and good custom be upheld.

The circumstance that the conflict in this case was a **dispute between two private parties**, was not a reason for the European Court to declare the application inadmissible. Indeed, the Court found that the applicants' eviction was the result of a domestic court's ruling, making the Swedish State responsible within the meaning of Article 1 of the Convention for any resultant breach of Article 10 of the Convention. The European Court observed that the satellite dish enabled the applicants to receive television programmes in Arabic and Farsi from their country of origin (Iraq). That information included political and social news and was of particular interest to them as an immigrant family who wished to maintain contact with the culture and language of their country of origin. There had not been any other means at the relevant time for the applicants to have access to such programmes and the dish could not be placed anywhere else. Nor could news obtained from foreign newspapers and radio programmes in any way be equated with information available via television broadcasts. It had not been shown either that the landlord installed broadband or internet access or other alternative means which gave the tenants in the building the possibility to receive these television programmes. Furthermore, the landlord's concerns about safety had been examined by the domestic courts who had found that the installation had

been safe. And there were certainly no aesthetic reasons to justify the removal of the antenna, as the flat was located in one of the suburbs of Stockholm, in a tenement house with no particular aesthetic aspirations. Moreover, the fact that the applicants had **effectively been evicted from their home with their three children**, a flat in which they had lived for more than six years, had been disproportionate to the aim pursued, namely the landlord's interest of upholding order and good custom. The Court therefore concluded that the interference with the applicants' right to freedom of information had not been "necessary in a democratic society": **Sweden had failed in its positive obligation to protect the right of the applicants to receive information**. The European Court held unanimously that there had been a violation of Article 10, while it further held unanimously that there was no need to examine the complaint under Article 8. The applicants were awarded EUR 6,500 in respect of pecuniary damage, EUR 5,000 in respect of non-pecuniary damage and EUR 10,000 for costs and expenses.

74.- A. v. Norway, 9 April 2009 (right of privacy, presumption of innocence, picture, crime reporting)

The European Court in this judgment clarified the relation between the freedom of the press (Art. 10) *vis à vis* the right of privacy (Art. 8) and the presumption of innocence (Art. 6 § 2) in a case of crime reporting in the media. The applicant, A, is a Norwegian national with a criminal past. The case concerns A's complaint about the unfavourable outcome of a defamation suit he brought against the *Fœdrelandsvennen* newspaper following their publication of two articles concerning the preliminary investigation into a murder case which implicated him. A had been questioned about the murder of two young women as a possible witness but was released after 10 hours. The police's interest in A attracted considerable media attention. *Fœdrelandsvennen* disclosed details of A's criminal convictions and stated that he had allegedly been seen by witnesses in the very same area and at the same time as the girls were killed. A television station, *TV2*, had also reported in a news broadcast on the case and had presented A as a murderer.

A brought defamation proceedings against the *Fœdrelandsvennen* newspaper and *TV2* as further investigation and proceedings had made clear that he had nothing to do with the murder case. The Norwegian courts found in his favour and awarded him compensation as regards the *TV2* report. In respect of the newspaper articles, however, the **domestic courts agreed that the publications had been defamatory in as much as they were capable of giving the ordinary reader the impression that the applicant was regarded as the most probable perpetrator of the murders, yet concluded that, on balance, the newspaper had been right to publish the articles, as it had acted in the interest of the general public, which had the right to be informed of the developments in the investigation and pursuit of the perpetrators**. Relying on Article 6 § 2 (presumption of innocence) and Article 8 (right to respect for private and family life), A complained in Strasbourg that the domestic courts' findings – in justification of the *Fœdrelandsvennen* newspaper publishing defamatory material about him – had affected negatively his right to be presumed innocent until proven otherwise as well as his private life.

The Court dismissed A's allegations under Article 6 § 2 as it found that Article not applicable to the matters complained of, given in particular that **no public authority had charged A with a criminal offence and that the disputed newspaper publications did not amount to an affirmation that he was guilty of the crimes in question**. The Court however is of the opinion that the articles had been **defamatory in nature as they had given the impression that the applicant had been a prime suspect in the murder case of the two girls**. While it had been undisputed that the press had the right to deliver information to the public, and the public had the right to receive such information, these considerations did not justify the defamatory allegations against A and the consequent harm done to him. Indeed, the applicant had been persecuted by journalists in order to obtain his pictures and interviews, and in particular during a period in his life when he had been undergoing rehabilitation and reintegration into society. As a result of the journalistic reports, he had found himself unable to continue his work, had to leave his home and had been driven into social exclusion. In the Court's view there was no reasonable relationship of proportionality between the interests relied on by the domestic courts in safeguarding *Fœdrelandsvennen'* freedom of expression and those of the applicant in having his honour, reputation and privacy protected. The Court is therefore not satisfied that the national courts struck a fair balance between the newspaper's

freedom of expression under Article 10 and the applicant's right to respect for his private life under Article 8, notwithstanding the wide margin of appreciation available to the national authorities. The Court concluded that the publications in question had **gravely damaged A's reputation and honour and had been especially harmful to his moral and psychological integrity and to his private life, in violation of Article 8.**

75.- Times Newspapers Ltd. (nos. 1 and 2) v. the United Kingdom, 10 March 2009 (internet publication rule)

The European Court of Human Rights held unanimously that there had been no violation of Article 10 of the European Convention on Human Rights, because the British courts' finding that the *Times Newspapers Ltd* had libelled G.L. by the **continued publication on its Internet site** of two articles had not represented a disproportionate restriction on the newspaper's freedom of expression.

The applicant in this case, Times Newspapers Ltd, is the owner and publisher of *The Times* newspaper, registered in England. It published two articles, in September and October 1999 respectively, reporting on a massive money-laundering scheme carried out by an alleged Russian mafia boss, G.L., whose name was set out in full in the original article. Both articles were uploaded onto *The Times* website on the same day as they were published in the paper version of the newspaper. In December 1999, **G.L. brought proceedings for libel against the Times Newspapers Ltd, its editor and the two journalists who signed the two articles printed in the newspaper.** The defendants did not dispute that the articles were potentially defamatory but contended that the allegations were of such a kind and seriousness that they had a duty to publish the information and the public had a corresponding right to know. While the first libel action was underway, the articles remained on *The Times* website, where they were accessible to Internet users as part of the newspaper's archive of past issues. In December 2000, G.L. brought a second action for libel in relation to the continuing Internet publication of the articles. Following this the defendants added a notice to both articles in the Internet archive announcing that they were subject to libel litigation and were not to be reproduced or relied on without reference to Times Newspapers Legal Department.

Times Newspapers subsequently argued that only the first publication of an article posted on the Internet should give rise to a cause of action in defamation and not any subsequent downloads by Internet readers. Accordingly, *Times Newspapers* submitted, the second action had been commenced after the limitation period for bringing libel proceedings had expired. **The British courts disagreed, holding that, in the context of the Internet, the common law rule according to which each publication of a defamatory statement gave rise to a separate cause of action meant that a new cause of action accrued every time the defamatory material was accessed ("the Internet publication rule")**.

Relying on Article 10 of the Convention, the Times Newspapers Ltd complained before the Strasbourg Court that the Internet publication rule breached its freedom of expression by exposing them to ceaseless liability for libel. The European Court noted that while **Internet archives were an important source for education and historical research, the press had a duty to act in accordance with the principles of responsible journalism, including by ensuring the accuracy of historical information.** Further, the Court observed that **limitation periods in libel proceedings were intended to ensure that those defending actions were able to defend themselves effectively and that it was, in principle, for contracting States to set appropriate limitation periods**. The Court considered it significant that although libel proceedings had been commenced in respect of the two articles in question in December 1999, no qualification was added to the archived copies of the articles on the Internet until December 2000. The Court noted that the archive was managed by the applicant itself and that the domestic courts had not suggested that the articles be removed from the archive altogether. Accordingly, the Court did not consider that the requirement to publish an appropriate qualification to the Internet version of the articles constituted a disproportionate interference with the right to freedom of expression. There was accordingly no violation of Article 10.

Having regard to this conclusion, the Court did not consider it necessary to consider the broader chilling effect allegedly created by the Internet publication rule. It nonetheless observed that, in the present case, **the two libel actions related to the same articles and both had been com-**

menced within 15 months of the initial publication of the articles. The Times Newspaper's ability to defend itself effectively was therefore not hindered by the passage of time. Accordingly, the problems linked to ceaseless liability did not arise. However, the Court emphasised that while individuals who are defamed must have a real opportunity to defend their reputations, **libel proceedings brought against a newspaper after too long a period might well give rise to a disproportionate interference with the freedom of the press under Article 10 of the Convention.**

76.- TASZ v. Hungary, 14 April 2009 and Kenedi v. Hungary, 26 May 2009 (access to official documents held by public authorities)

The European Court of Human Rights in the spring of 2009 delivered two important judgments in which it recognised the right of access to official documents. The Court made clear that when public bodies hold information that is needed for public debate, the **refusal to provide documents in this matter to those who are requesting for access, is a violation of the right to freedom of expression and information guaranteed under Article 10 of the Convention**. The case of TASZ v. Hungary concerns a request by the Hungarian Civil Liberties Union (*Társaság a Szabadságjogokért, TASZ*) to Hungary's Constitutional Court to disclose a parliamentarian's complaint questioning the legality of new criminal legislation concerning drug-related offences. The Constitutional Court refused to release the information. As the Court finds that the applicant was involved in the legitimate gathering of information on a matter of public importance and that the Constitutional Court's monopoly of information amounted to a form of censorship, it concludes that the interference with the applicant's rights was a violation of Article 10 of the Convention.

The European Court's judgment refers indeed to the "*censorial power of an information monopoly*" when public bodies refuse to release information needed by the media or civil society organisations to perform their "watchdog" function. The Court refers to its consistent case law in which it has recognised that the public has a right to receive information of general interest and that the most **careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern, even measures which merely make access to information more cumbersome**. It is also underlined that the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information, this by itself being an **essential preparatory step in journalism and inherently a protected part of press freedom**. The Court emphasises once more that the function of the press, including the creation of forums of public debate, is not limited to the media or professional journalists. Indeed, in the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The Court recognises civil society's important contribution to the discussion of public affairs and qualified the applicant association, which is involved in human rights litigation, as a social "watchdog". The Court is of the opinion that in these circumstances the applicant's activities warrant similar Convention protection to that afforded to the press. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.

It is to be underlined that this European Court's judgment is obviously a new step in the direction of the recognition by the Court of a right of access to public documents under Article 10 of the Convention, although the Court is still reluctant to affirm this explicitly. The Court recalls that *"Article 10 does not (..) confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual"* and that *"it is difficult to derive from the Convention a general right of access to administrative data and documents"*. But the judgment also states that *"the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (..) and thereby towards the recognition of a right of access to information*", referring to its decision in the case of *Sdruženi Jihočeské Matky v. Czech Republic*, ECtHR 10 July 2006, Appl. 19101/03). The Court notes that *"the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him"*. In this case the information sought by the applicant was ready and available and did not require the collection

of any data by the Government. Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant.

In another judgment with Hungary as the defendant state the Court has confirmed the applicability of the right to freedom of expression and information guaranteed under Article 10 of the Convention in matters **of access to official documents**. The case concerns the attempt of a historian, Mr. János Kenedi, to have access to certain documents deposited at the Ministry of the Interior regarding the functioning of the State Security Services in Hungary in the 1960s. Mr Kenedi's, who earlier published several books on the functioning of secret services in totalitarian regimes, complained to the European Court about the Hungarian authorities' protracted reluctance to enforce a court order granting him unrestricted access to these documents. **For several years Kenedi tried to get access to relevant information from the Ministry, but to no avail**. After continued refusals, he obtained domestic court orders to enforce access. The Ministry, however, continued to obstruct, for example by requiring that Kenedi would sign a declaration of confidentiality. Kenedi refused, also because the Court order had not mentioned confidentiality as a requirement. At the moment of the proceedings in Strasbourg Kenedi still did not have access to all documents he requested for.

The European Court held unanimously that there had been a violation of Article 6 § 1 (*right to a fair hearing*) of the European Convention on Human Rights, on account of the excessively long proceedings - over ten years - with which Mr Kenedi sought to gain and enforce his access to documents concerning the Hungarian secret services. Article 10 (*freedom of expression and information*) was also violated in the Court's view. It reiterated that *"access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression"*. The Court noted that Mr Kenedi had obtained a court judgment granting him access to the documents in question, following which the domestic courts had repeatedly found in his favour in the ensuing enforcement proceedings. **The administrative authorities had persistently resisted their obligation to comply with the domestic judgment thus hindering Mr Kenedi's access to documents he had needed to write his study.** The Court concluded that the authorities had acted arbitrarily and in defiance of domestic law. Their obstructive actions had also led to the finding of a violation of Article 6 § 1 of the Convention. The Court held, therefore that the authorities had misused their powers by delaying Mr Kenedi's exercise of his right to freedom of expression, in violation of Article 10.

Finally, Article 13 ECHR (*effective remedy*) had also been violated, since the Hungarian system did not provide for an effective way of remedying the violation of the freedom of expression in this situation. **The Court found that the procedure available in Hungary at the time and designed to remedy the violation of Mr Kenedi's Article 10 rights had proven ineffective**. There had, therefore, been a violation of Article 13 read in conjunction with Article 10 of the Convention.

Again the Court does not formulate a general right of access to (official) documents. The Court is however of the opinion that the access was necessary for the applicant to accomplish the publication of a historical study. The Court noted that the intended publication fell within the applicant's freedom of expression as guaranteed by Article 10 of the Convention.

77.- Verein gegen Tierfabriken Schweiz VGT (no. 2) v. Switzerland (Grand Chamber), 30 June 2009 (political advertising, commercial, execution of judgment, new violation)

After two earlier judgments by the European Court of Human Rights, the Grand Chamber of the Court again held that there has been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights on account of the continued prohibition to broadcast on Swiss Television **a commercial by an animals' right association**. In response to various advertisements produced by the meat industry, Verein gegen Tierfabriken Schweiz (VgT) made a television commercial expressing criticism of battery pig-farming, including a scene showing a noisy hall with pigs in small pens. The advertisement concluded with the exhortation: *"Eat less meat, for the sake of your health, the animals and the environment!"*. Permission to broadcast the commercial was refused on 24 January 1994 by the Commercial Television Company and at final instance by the Federal Court, which dismissed an administrative-law appeal by VgT on 20 August 1997. The commercial was considered as political advertising, prohibited under the Swiss Broadcasting Act. VgT lodged an application with the European Court of Human Rights, which in a

judgment of 28 June 2001 held that the Swiss authorities' refusal to broadcast the commercial in question was in breach of freedom of expression. According to the European Court, VgT had simply intended to participate in an on-going general debate on the protection and rearing of animals and the Swiss authorities had not demonstrated in a relevant and sufficient manner why the grounds generally advanced in support of the prohibition of political advertising could also serve to justify the interference in the particular circumstances of the case. The Court found a violation of Article 10 of the Convention and awarded VgT 20,000 Swiss francs (approximately EUR 13,300 at the time) for costs and expenses.

On 1 December 2001, on the basis of the European Court's judgment, VgT applied to the Swiss Federal Court for a review of the final domestic judgment prohibiting the commercial from being broadcast. In a judgment of 29 April 2002 the Federal Court however dismissed the application, holding among other things that VgT had not demonstrated that there was still any purpose in broadcasting the commercial. As the Committee of Ministers of the Council of Europe, which is responsible for supervising the execution of the European Court's judgments, had not been informed that the Federal Court had dismissed VgT's application for a review, it adopted a final resolution regarding the case in July 2003, referring to the possibility of applying to the Federal Court to reopen the proceedings.

In July 2002 VgT lodged an application with the European Court concerning the Federal Court's refusal of its request to reopen the proceedings and the continued prohibition on broadcasting its television commercial. In a Chamber judgment of 4 October 2007 the European Court held by five votes to two that there had been a violation of Article 10. On 31 March 2008 the panel of the Grand Chamber accepted a request by the Swiss Government for the case to be referred to the Grand Chamber under Article 43 of the Convention. The Swiss government argued *inter alia* that the application by VgT was inadmissible, as it concerned a subject – execution of the Court's judgments – which, by virtue of Article 46, fell within the exclusive jurisdiction of the Committee of Ministers of the Council of Europe. The Grand Chamber of the European Court reiterated that the findings of the European Court of a violation were essentially declaratory and that it was the Committee of Ministers' task to supervise execution. The Committee of Ministers' role in that sphere did not mean however that measures taken by a respondent State to remedy a violation found by the Court could not raise a new issue and thus form the subject of a new application. In the present case the Federal Court's judgment of 29 April 2002 refusing the reopen the proceedings had been based on new grounds and therefore constituted new information of which the Committee of Ministers had not been informed and which would escape all scrutiny under the Convention if the Court were unable to examine it. Accordingly, the Government's preliminary objection on that account was dismissed.

On the merits of the case the Court firstly noted that the refusal of VgT's application to reopen the proceedings following the Court's judgment of 28 June 2001 constituted fresh interference with the exercise of its rights under Article 10 § 1. The Court emphasized that freedom of expression is one of the preconditions for a functioning democracy and that genuine, effective exercise of this freedom did not depend merely on the State's duty not to interfere, but could also require positive measures. In the present case Switzerland had been under an obligation to execute the Court's judgment of 28 June 2001 in good faith, abiding by both its conclusions and its spirit. In that connection the reopening of domestic proceedings had admittedly been a significant means of ensuring the full and proper execution of the Court's judgment, but could certainly not be seen as an end in itself, especially since the Federal Court dismissed the application of VgT on overly formalistic grounds. Moreover, by deciding that VgT had not sufficiently shown that it still had an interest in broadcasting the commercial, the Federal Court did not offer an explanation of how the **public debate on battery farming** had changed or become less topical since 1994, when the commercial was initially meant to have been broadcast. Nor did it show that after the European Court's judgment of 28 June 2001 the circumstances had changed to such an extent as to cast doubt on the validity of the grounds on which the Court had found a violation of Article 10. **The European Court also rejected the argument that VgT had alternative options for broadcasting the commercial in issue,** for example via private and regional channels, since that would require third parties, or VgT itself, to assume a responsibility that falls to the national authorities alone: that of taking appropriate action on a judgment of the European Court. Finally the argument that the broadcasting of the commercial might be seen as unpleas-

ant, in particular by consumers or meat traders and producers, cannot justify its continued prohibition, as **freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb**. Such are indeed the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". In the absence of any new grounds that could justify continuing the prohibition from the standpoint of Article 10, **the Swiss authorities had been under an obligation to authorise the broadcasting of the commercial, without taking the place of VgT in judging whether the debate in question was still a matter of public interest**. The Court therefore held by 11 votes to six that there had **been a violation of Article 10**. Under Article 41 (just satisfaction) of the Convention the Court awarded VgT 4,000 euros (EUR) for costs and expenses.

78.- Féret v. Belgium, 16 July 2009 (political expression, incitement to racism and discrimination, proportionality of sanction)

In an interesting but highly controversial judgment the European Court has focussed on the limits of freedom of expression in a case of incitement to hatred and discrimination ('hate speech'). The Court held by four votes to three that there had been no violation of Article 10 of the European Convention of Human Rights in respect of the conviction of the chairman of the Belgian political party "*Front National*", Mr. Daniel Féret. Mr. Féret was convicted by a Belgian criminal court for publicly inciting to racism, hatred and discrimination, following complaints concerning leaflets distributed by the *Front National* during election campaigns.

Between July 1999 and October 2001 the distribution of leaflets and posters by the *Front National* led to complaints by individuals and associations for incitement to hatred, discrimination and violence, filed under the law of 30 July 1981 which penalised certain acts and expressions inspired by racism or xenophobia. Mr. Féret was the editor in chief of the party's publications and was a member of the Belgian House of Representatives at the relevant time. His parliamentary immunity however was waived on the request of the Principal Public Prosecutor at the Brussels Court of Appeal and in November 2002 criminal proceedings were brought against Féret as author and editor-in-chief of the offending leaflets which were also distributed on the Internet through the website of Féret and *Front National*.

In 2006 the Brussels Court of Appeal found that the offending conduct on the part of Mr. Féret had not fallen within his parliamentary activity and that the leaflets contained passages that represented a clear and deliberate incitement to discrimination, segregation or hatred, for reasons of race, colour or national or ethnic origin. The court sentenced Mr. Féret to 250 hours of community service related to the integration of immigrants, together with a 10-month suspended prison sentence. It declared him ineligible for ten years and ordered him to pay one euro to each of the civil parties.

Relying on Article 10 of the European Convention on Human Rights, Féret applied to the European Court of Human Rights alleging that the conviction for the content of his political party's leaflets represented an excessive restriction on his right to freedom of expression. The European Court however disagreed with this assumption, as it considered the sanction by the Belgian authorities sufficiently precisely prescribed by law and necessary in a democratic society for the protection of public order and for the protection of the reputation and the rights of others, meeting the requirements of Article 10 § 2 of the Convention. The European Court observed that the leaflets presented immigrant communities as criminally-minded and keen to exploit the benefits they derived from living in Belgium, and that they also sought to make fun of the immigrants concerned, with the **inevitable risk of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners.** Although the Court recognised that freedom of expression is especially important for elected representatives of the people, **it reiterated that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance.** The impact of racist and xenophobic discourse was magnified in an electoral context, in which arguments naturally became more forceful. **To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions. In the present case there had been a compelling social need to protect the rights of the immigrant community, as the Belgian courts had done.** With regard to the penalty imposed on Mr. Féret, the European Court noted that the Belgian authorities had

preferred a 10-year period of ineligibility rather than a penal sanction, in accordance with the Court's principle of restraint in criminal proceedings. The Court thus found that there had been no violation of Article 10 of the Convention. The Court furthermore found that **Article 17 of the Convention (abuse clause) was not applicable in this case.**

Three **dissenting judges** disagreed with the findings of the Court on the non-violation of Article 10, arguing that the leaflets were in essence part of a sharp political debate in election time. The dissenters expressed the opinion that the **leaflets did not incite to violence nor to any concrete discriminatory act and that criminal convictions in the domain of freedom of political debate and hate speech should only be considered as necessary in a democratic society in cases of direct incitement to violence or discriminatory acts.** They argue that the reference to a *potential* impact of the leaflets in terms of incitement to discrimination or hatred does not sufficiently justify an interference in the freedom of expression. **The dissenters also emphasize the disproportionate character of the sanction** in terms of 250 hours of community service or a 10-month suspended prison sentence, together with the Belgian Court's decision declaring Mr. Féret's ineligibility for a period of ten years. The majority of the European Court however could not be persuaded by the dissenters' arguments: the four judges of the majority are of the opinion that the Belgian authorities have acted within the scope of the justified limitations restricting freedom of political expression, as the litigious leaflets contained, in the eyes if the Court, incitement to hatred and discrimination based on nationality or ethnic origin.

(See also Decision ECtHR, 20 April 2010, Jean-Marie Le Pen v. France, Appl. no. 18788/09)

79.- Wojtas-Kaleta v. Poland, 16 July 2009 (political expression, horizontal effect, journalist, disciplinary sanction, employee)

In this case the European Court of Human Rights found that the freedom of expression of a journalist employed by the Polish public television (*Telewizja Polska Spółka Akcjna*, *TVP*) has been unduly restricted. The journalist, Helena Wojtas-Kaleta, was disciplinary sanctioned after criticising in public the direction of *TVP*. This sanction and the confirmation of it by the Polish courts is considered a violation of Article 10 of the European Convention for Human Rights.

In 1999 the national newspaper *Gazeta Wyborcza* published an article reporting that two classical music programmes had been taken off the air by *TVP*. The article quoted an opinion expressed by Ms Wojtas-Kaleta in her capacity of the President of the *Polish Public Television Journalists' Union* in which she criticised this decision by the TVP director. In addition, Ms Wojtas-Kaleta signed an open letter in protest against the above measure. The letter was addressed to the Board of *TVP* and stated among other things that while classical music was the heritage of the nation, its continuous dissemination was seriously jeopardised by diminishing its time on the air and polluting air time instead with violence and pseudo-musical kitsch. Ms Wojtas-Kaleta was **reprimanded** in writing by her employer for failing to observe the company's regulations which required her to protect her employer's good name. Following an unsuccessful objection to the reprimand, she brought a claim against *TVP* before the district court requesting the withdrawal of the reprimand. However, first the district court and later the Court of appeal dismissed her claim and found that Ms Wojtas-Kaleta had behaved in an unlawful manner and that this was a necessary and sufficient prerequisite for the disciplinary measure imposed on her. The courts found that she had acted to the detriment of her employer by **breaching her obligation of loyalty and, consequently, the employer had been entitled to impose the reprimand on her**.

Ms Wojtas-Kaleta complained in Strasbourg that the Polish judicial authorities had violated her freedom of expression by having referred merely to her obligations as an employee while disregarding her right as a journalist to comment on matters of public interest. The Court considered that where a State had decided to create a public broadcasting system, the domestic law and practice had to guarantee that the system provided a pluralistic audiovisual service. The Polish public television company had been entrusted with a special mission including, among other things, assisting the development of culture with emphasis on the national intellectual and artistic achievements. In her comments and open letter Ms Wojtas-Kaleta had essentially referred **to widely shared concerns of public interest about the declining quality of music programmes on public television and her statements had relied on a sufficient factual basis and at the same time amounted to value judg-**

ments which were not susceptible of proof. The Court further noted that Ms Wojtas-Kaleta had to enjoy freedom of expression in all her capacities: as an employee of a public television, as a journalist or as a trade-union leader. The Court observes that the Polish courts took no note of her argument that she had been acting in the public interest. They limited their analysis to a finding that her comments amounted to acting to the employer's detriment. As a result, they did not examine whether and how the subject matter of Ms Wojtas-Kaleta's comments and the context in which they had been made could have affected the permissible scope of her freedom of expression. Such an approach is not compatible with the Convention standards. **The Court notes that the tone of the impugned statements was measured and that she did not make any personal accusations against named members of the management. Finally, the journalist's good faith had never been challenged neither by her employer nor by the domestic authorities involved in the proceedings.** Being mindful of the importance of the right to freedom of expression on matters of general interest, of Ms Wojtas-Kaleta's professional obligations and responsibilities as a journalist, and of the duties and responsibilities of employees towards their employers, and having weighed up the other different interests involved in the present case, the Court comes to the conclusion that the interference with her right to freedom of expression was not "necessary in a democratic society". Accordingly, the Court held that there had been a violation of Article 10.

80.- Manole a.o. v. Moldova, 17 September 2009 (pluralism, independent media, public broadcasting, political control, censorship) and 13 July 2010 (art. 41)

The European Court of Human Rights found that from February 2001 until September 2006 the Moldovan authorities have violated freedom of expression by **not sufficiently guaranteeing the independence of Teleradio-Moldova (TRM), the state-owned broadcasting company, which was transformed in 2002 into a public broadcasting company**. Nine journalist, editors and producers, who were all employed by TRM in that period complained that public broadcasting company was subjected to **political control** by the government and the ruling political party, with a lack of guarantees of pluralism in its editorial policy and news and information programmes. Relying on Article 10 of the European Convention they complained that as journalists at TRM they were subjected to a **censorship regime.** They also claimed that the **political control over news and political information** worsened after February 2001 when the Communist Party won a large majority in Parliament : senior TRM-management was replaced by those who were loyal to the Government, only a trusted group of journalists were used for reports of a political nature which where edited to present the ruling party in a favourable light, other journalists were reprimanded, interviews were cut and programmes were taken off the air, while opposition parties were allowed only very limited opportunity to express their views. After a strike by TRM-journalists protesting against the government's media policy and the control over TRM, a large number of journalists was not retained in post after a structural reorganisation of TRM. The journalists claimed that they were **dismissed for political reasons** and appealed in court. Unsuccessfully however. In the meantime a number of reports by international organisations and non-governmental organisations such as the Council of Europe, OSCE and the Moldovan Centre for Independent Journalism (IJC) affirmed that domestic law in Moldova did **not sufficiently guarantee the independence of editorial policy at TRM and that the political parties of the opposition were not adequately represented in the TRM news and information programmes.** The nine journalists lodged an application with the European Court in March 2002, arguing that their rights of freedom of expression had been violated, due to the censorship regime imposed on them. They also claimed that the Moldovan State had not discharged its positive obligations under Article 10 because it had failed to enact legislation which would offer safeguards against abusive interferences by public authorities.

In its judgment the European Court takes as starting point the fundamental truism that there can be **no democracy without pluralism**. A situation whereby a powerful economic or political group in a society is permitted to obtain a **position of dominance over the audiovisual media** and thereby exercise pressure on broadcasters and eventually **curtail their editorial freedom** undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. The Court further observes that it

is the **State itself that must be the ultimate guarantor of pluralism** and that the State has a duty to ensure that **the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting the diversity of political outlook** within the country. Journalists and other professionals working in the audiovisual media should not be prevented from imparting this information and comment. **Furthermore it is indispensable for the proper functioning of democracy that a (dominant) public broadcaster transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which a broad spectrum as possible of views and opinions can be expressed**. The Court concludes on the evidence and reports by the Council of Europe, OSCE and IJC that there was a significant bias towards reporting on the activities of the President and the Government in TRM's television news and other programming and that this policy by TRM has indeed affected the applicants as journalist, editors and producers at TRM. The Court also finds that domestic law from February 2001 onwards did not provide any guarantee of **political balance in the composition of TRM's senior management and supervisory body** nor any safeguard against interference from the ruling political party in the bodies' decision-making and functioning. Also after 2002 there was no safeguard to prevent 14 of the 15 members of the Observers' Council being appointees loyal to the ruling party, while this Council was precisely responsible for appointing TRM's senior management and monitoring its programmes for accuracy and objectivity. In the light in particular of the **virtual monopoly** enjoyed by TRM over audiovisual broadcasting in Moldova, the Court finds that the Moldovan State authorities failed to comply with their positive obligation. The legislative framework throughout the period in question was flawed : it did not provide sufficient safeguards against the control of TRM′s senior management, and thus its editorial policy, by the political organ of the Government. As Moldovan **law did not provide any mechanism or effective domestic remedy to challenge at national level the administrative practice of censorship and political control over TRM**, the Court also rejects the Moldovan Government's objection that the applicants had not exhausted the remedies available to them under national law, as required by Article 35 § 1 of the Convention. On that basis, the Court finds a violation of Article 10 of the Convention

In its judgment of **13 July 2010** deciding on the just satisfaction (art. 41 ECHR) the Court confirmed that the applicants, as journalists and editors employed by TRM, were directly affected by the failure by the State to prevent censorship and political influence at TRM. On the basis that the applicants′ complaints concerned principally the deficiencies in the legislative framework and the practice of censorship at TRM, the Court referred to the fact that they were exempted from the requirement to exhaust domestic remedies (see ECtHR's judgment of 17 September 2010, §§ 112-113). The Court did not, however, make any findings as regards the applicants′ individual employment histories. Nor did it examine whether the applicants had exhausted domestic remedies in respect of the various disciplinary, reinstatement, dismissal and redundancy measures taken against them. It follows that the Court does not consider it appropriate in the present case to award compensation in respect of any pecuniary damage suffered by the applicants as a result of any such measure. Moreover, although the Court cannot in the present proceedings examine the new legislation to determine whether the situation which gave rise to the violation has been remedied, **the Court notes with satisfaction that measures have been taken by the national authorities to reform the legal framework with a view to bringing to an end the administrative practice that gave rise to the violation**. In all the circumstances, it awards each applicant EUR 2,000 in respect of non-pecuniary damage.

81.- Financial Times Ltd. a.o. v. the United Kingdom, 15 December 2009 (journalist, protection of sources, conduct of the source, reliable content of leaked information)

In 2002 British courts decided in favour of **a disclosure order** in the case of *Interbrew SA* v. *Financial Times* and others. The case concerns the order against four newspapers (FT, The Times, The Guardian and The Independent) and the news agency Reuters to deliver up their original copies of a leaked and (apparently) partially forged document about a contemplated takeover by Interbrew (now: Anheuser Busch InBev NV) of SAB (South African Breweries). In a judgment of 15 December 2009 the European Court of Human Rights (Fourth Section) has come to the conclusion that this disclosure order was a violation of

the right of freedom of expression and information, which includes press freedom and the right of protection of journalistic sources as protected by Article 10 of the European Convention of Human Rights.

On the basis of a leaked report by a person X and further investigations by journalists, the British media in November and December 2001 had reported that Interbrew (now: Anheuser Bush InBev NV), had been plotting a bid for SAB. The media coverage had a clear impact on the market in shares of Interbrew and SAB, Interbrew's share price decreasing, while both the share price and the volume of SAB's shares traded had obviously increased. On request of Interbrew, the High Court on 19 December 2001 ordered delivery up of the documents under the so-called ***Norwich Pharmacal*** **principle. This principle implies that if a person through no fault of his own becomes involved in the wrongdoing of others so as to facilitate that wrongdoing, he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoer**. The four newspapers and the news agency were ordered not to alter, deface or dispose or otherwise deal with the documents received by person X and to deliver up the documents to Interbrew's solicitor within 24 hours. The newspapers and Reuters appealed, but the disclosure order was confirmed by the Court of Appeal. In the London Court's judgment it is emphasized that what matters critically, is the sources purpose in this case: "*It was on any way a maleficent one, calculated to do harm whether for profit or for spite, and whether to the investing public or Interbrew or both*". **The public interest in protecting the source of such a leak was considered not sufficient to withstand the countervailing public interest in letting Interbrew seek justice in the courts against the source**. It was also underlined that there is "*no public interest in the dissemination of falsehood",* as the judge had found that the document, leaked by person X to the media, was partially forged. The Court of Appeal said: "*While newspapers cannot be asked to guarantee the veracity of everything they report, they in turn have to accept that the public interest in protecting the identity of the source of what they have been told is disinformation may not be great*". Hence the Court of Appeal dismissed the appeals. On 9 July 2002 the House of Lords refused the newspapers' leave to appeal, following which Interbrew required the newspapers and Reuters to comply with the court order for delivery up of the documents. The newspapers and Reuters however have kept on refusing to comply and applied to the European Court of Human Rights, arguing that their rights under Article 10 of the Convention had been violated.

The European Court of Human Rights has come to the conclusion that the British judicial authorities in the Interbrew case have indeed neglected the interests related to the protection of journalistic sources, by overemphasizing the interests and arguments in favour of source disclosure. The Court accepts that the disclosure order in the Interbrew case was prescribed by law (*Norwich Pharmacal* and Section 10 of the *Contempt of Court Act* 1981) and was intended to protect the rights of others and to prevent the disclosure of information received in confidence, both of which are legitimate aims. The Court however does not consider the disclosure order necessary in a democratic society. First the Court in general terms reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that, in that context, the safeguards guaranteed to the press are particularly important : "*protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital "public watchdog" role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected*" (§ 59). Disclosure orders of journalistic sources have a **detrimental impact** not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be **negatively affected in the eyes of future potential sources by the disclosure**, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves. The Courts accepts that it may be true that the public perception of the principle of non-disclosure of sources would suffer **no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information**. The Court makes clear however that domestic courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. The Court emphasizes most importantly that "***the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 §*** *2*" (§ 63).

Applying these principles to the Interbrew case the European Court of Human Rights comes to the conclusion that the **British Courts have given too much weight to the alleged bogus character of the leaked document and to the assumption that the source had acted *mala fide***. While the Court considers that there may be circumstances in which the source's harmful purpose would in itself constitute a relevant and sufficient reason to make a disclosure order, the legal proceedings against the four newspapers and Reuters did not allow X's purpose to be ascertained with the necessary degree of certainty. **The Court therefore does not place significant weight on X's alleged purpose in the present case, but does clearly emphasize the public interest in the protection of journalistic sources. The Court accordingly, finds that Interbrew's interests in eliminating, by proceedings against X, the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest** in the protection of journalists' sources. The judicial order to deliver up the report at issue is considered a violation of Article 10 of the Convention. The European Court was unanimous in its judgment, although it took the Court seven years to come to its conclusion.

82.- Ürper (n° 2) v. Turkey, 26 January 2010 (prior restraint, newspapers, terrorist propaganda)

The European Court of Human Rights in this case again found a series of gross violations of press freedom in Turkey. The Court's judgment in the case of Ürper a.o. v. Turkey condemns firmly the **bans on future publication of four newspapers.**

At the material time the applicants were the owners, executive directors, editors-in-chief, news directors and journalists of four daily newspapers published in Turkey: *Ülkede Özgür Gündem*, *Gündem*, *Güncel* and *Gerçek Demokrasi*. The publication of all four newspapers was **suspended**, pursuant to section 6(5) of the Prevention of Terrorism Act (Law no. 3713), by various Chambers of the Istanbul Assize Court, between 16 November 2006 and 25 October 2007, for periods ranging from 15 days to a month in respect of various news reports and articles. **The impugned publications were deemed to be propaganda in favour of a terrorist organisation, the PKK/KONGRA-GEL, as well as the approval of crimes committed by that organisation and its members.**

he applicants alleged under Article 10 of the Convention that the suspension of the publication and distribution of their newspapers constituted an unjustified interference with their freedom of expression. **The European Court reiterates that Article 10 of the Convention does not, in terms, prohibit the imposition of prior restraints on publication. However, the dangers inherent in prior restraints are such that they call for the most careful scrutiny. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication**, even for a short period, may well deprive it of all its value and interest. As freedom of the press was at stake, the national authorities had only a limited margin of appreciation to decide whether there was a "pressing social need" to take the measures in question. The Court is of the opinion that, different to earlier cases the Court dealt with, the restraints under scrutiny were not imposed on particular types of news reports or articles, but on the future publication of entire newspapers, whose content was unknown at the time of the national court's decisions. In the Court's view, both the content of section 6(5) of Law no. 3713 and the judges' decisions in the instant case stem from the hypothesis that the applicants, whose "guilt" was established without trial in proceedings from which they were excluded, would re-commit the same kind of offences in the future. The Court finds, therefore, **the preventive effect of the suspension orders entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future, and hinder their professional activities**. The Court considers that less draconian measures could have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles. **The Court concludes that by suspending the publication and distribution of the four newspapers involved, albeit for short periods, the domestic courts largely overstepped the narrow margin of appreciation** afforded to them and unjustifiably restricted the essential role of the press as a public watchdog in a democratic society. The practice of banning the future publication of entire periodicals on the basis of section 6(5) of Law no. 3713 went beyond any notion of "necessary" restraint in a democratic society and, instead, amounted to censorship. There has accord-

ingly been a violation of Article 10 of the Convention.

83.- Laranjeira Marques Da Silva v. Portugal, 19 January 2010 (journalist, defamation of politician, presumption of innocence, breach of the secret of the criminal investigation)

With this judgment the European Court of Human Rights has clarified how court and crime reporting can rely on the right to freedom of expression guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. **Convicting a journalist or a publisher for breach of the secrecy of a criminal investigation or because of defamation of a politician can only be justified when it is necessary in a democratic society and under very strict conditions**.

The applicant in this case, Mr Laranjeira Marques da Silva, was the editor of the regional weekly newspaper *Notícias de Leiria* at the relevant time. In 2000 he wrote **two articles about criminal proceedings brought against J., a doctor and politician well known in the region, for the sexual assault of a patient.** In an editor's note he called upon readers for further testimonies relating to other possible incidents of a similar nature involving J. A short time later Mr Laranjeira Marques da Silva was charged with a breach of the *segredo de justiça*, a concept similar to confidentiality of the judicial investigation, and with the defamation of J. The Leiria District Court held in 2004 that Mr Laranjeira Marques da Silva had overstepped his responsibilities as a journalist and had aroused widespread suspicion towards J. by insinuating, without justification, that the latter had committed similar acts involving other victims. He was found guilty of a breach of the *segredo de justiça* and of defamation. He was sentenced to a daily fine payable within 500 days and ordered to pay EUR 5,000 in damages to J. On appeal, the applicant challenged his conviction concerning the *segredo de justiça* on the ground that he had obtained access to the information in question lawfully. On the defamation issue he argued that he had simply exercised his right to freedom of expression and that his articles had been based on facts and, moreover, were related to a subject of general interest. The Court of Appeal dismissed his appeal in 2005. A constitutional appeal and later an extraordinary appeal seeking harmonisation of the case law with the Supreme Court were also unsuccessful. In Strasbourg, Mr. Laranjeira Marques da Silva complained essentially that his conviction had infringed his right to freedom of expression.

As to the applicant's conviction for breach of *the segredo de justiça*, the European Court was of the opinion that the Portuguese authorities' interference with his freedom of expression had been "prescribed by law" and that the interference in question had pursued the legitimate aim of protecting the proper administration of justice and the reputation of others. The Court however pointed out that **neither the concern to safeguard the investigation nor the concern to protect the reputation of others can prevail over the public's interest in being informed of certain criminal proceedings conducted against politicians.** It stressed that in this case there was no evidence of any damaging effects on the investigation, which had been concluded by the time the first article was published. The publication of the articles did not breach the presumption of innocence, as the case of Mr. J. was in hands of **professional judges**. Furthermore there was nothing to indicate that the conviction of Mr. Laranjeira Marques da Silva had contributed to the protection of the reputation of others. The Court held unanimously that the interference in the right of freedom of expression of the applicant was disproportionate and that therefore there had been a violation of Article 10.

As to the conviction for defamation, the Court accepted that the disputed articles dealt with matters of general interest, as the public had the right to be informed about investigations concerning politicians, including investigations which did not, at first sight, relate to their political activities. Furthermore, the issues before the courts could be discussed at any time in the press and by the public. As to the nature of the two articles, the Court pointed out that Mr Laranjeira Marques da Silva had simply imparted information concerning the criminal proceedings in question, despite adopting a critical stance towards the accused. **The Court observed that it was not its place or that of the national courts to substitute their own views for those of the press as to what techniques of reporting should be adopted within the frame of judicial reporting in the media (*'chronique judiciaire'*).** As to the editor's note, the Court takes the view that, notwithstanding one sentence which was more properly to be regarded as a value judgment, it had a **sufficient factual basis** in the broader context of the media coverage of the case. Hence, while the reasons given by the na-

tional courts for Mr Laranjeira Marques da Silva's conviction had been relevant, the authorities had not given sufficient reasons justifying the necessity of the interference with the applicant's right to freedom of expression. The Court further noted that the penalties imposed on the applicant had been excessive and liable to discourage the exercise of media freedom. The Court therefore held, by five votes to two, that the conviction for defamation did not correspond to a pressing social need and that there has been a violation of Article 10 of the Convention.

84.- Alfantakis v. Greece, 11 February 2010 (lawyer, defamation of public prosecutor)

In a case that received considerable media coverage in Greece, Georgis Alfantakis, a lawyer in Athens, was representing a popular Greek singer (A.V.). The singer had accused his wife, S.P., of fraud, forgery and use of forged documents causing losses to the State for nearly 150,000 euros. On the recommendation of the public prosecutor at the Athens Court of Appeal, D.M., it was decided not to bring charges against S.P. While appearing live as a guest on Greece's main television news programme 'Sky', Mr Alfantakis expressed his views on the criminal proceedings in question, commenting in particular that he had "laughed" on reading the public prosecutor's report, which he described as a "literary opinion showing contempt for his client". The public prosecutor sued Mr Alfantakis for damages, arguing that his **comments had been insulting and defamatory**. Mr Alfantakis was ordered by the Athen's Court Appeal to pay damages for about 12,000 euro. Alfantakis applied to the European Court of Human Rights, relying on Article 10 of the European Convention of Human Right. He complained about the civil judgment against him which he considered an unacceptable interference in his freedom of expression.

According to the European Court it was not disputed that the interference by the Greek authorities with Alfantakis's right to freedom of expression had been "prescribed by law" – by both the Civil Code and the Criminal Code – and had pursued the legitimate aim of protecting the reputation of others. The Court took notice of the fact that the offending comments were directed at a member of the national legal service, creating **the risk of a negative impact both on his professional image and on public confidence in the proper administration of justice**. Lawyers are entitled to comment in public on the administration of justice, but they are also expected to observe certain limits and rules of conduct. However, instead of ascertaining the direct meaning of the phrase uttered by the applicant, the Greek courts had carried out their own interpretation of what the phrase might have implied. In doing so, **the domestic courts have relied on particularly subjective considerations, potentially ascribing to the applicant intentions he had not in fact had**. Nor had the Greek courts made a distinction between facts and value judgments, instead simply determining the effect produced by the phrases "when I read it, I laughed" and "literary opinion". The Greek courts had also ignored the extensive media coverage of the case, in the context of which Mr Alfantakis's appearance on the television news was more indicative of an intention to **defend his client's arguments** in public than of a desire to impugn the public prosecutor's character. Lastly, they had not taken account of the fact that the comments had been broadcast live and could therefore not have been rephrased. The Court came to the conclusion that the civil judgment ordering Mr Alfantakis to pay damages was not based on sufficient and pertinent arguments and therefore had not met a "pressing social need". Hence there had been a violation of Article 10. The Court awarded Mr Alfantakis 12,939 euros in respect of pecuniary damage.

85.- Akdaş v. Turkey, 16 February 2010 (seizure of novel by Apollinaire, conviction of publisher, morals, obscenity, public access of work belonging to European cultural heritage, margin of appreciation)

The applicant in this case, Rahmi Akdaş is a publisher. In 1999 he published the Turkish translation of the erotic novel Les onze mille verges by the French writer Guillaume Apollinaire ("The Eleven Thousand Rods" – On Bir Bin Kırbaç in Turkish), which contains graphic descriptions of scenes of sexual intercourse, with various practices such as sadomasochism or vampirism. Akdaş was convicted under the Criminal Code for publishing obscene or immoral material liable to arouse and exploit sexual desire among the population. The publisher argued that the book was a work of fiction, using literary techniques such as exaggeration or metaphor, and that the postface to the edition in question was written by specialists in literary analysis. He added that the book did not contain any violent overtones and

that the humorous and exaggerated nature of the text was more likely to extinguish sexual desire.

The **seizure and destruction of all copies of the book was** ordered and Akdaş was given a **fine** of 1,100 euros, a fine that may be converted into days of imprisonment. In a final judgment of 11 March 2004 the Court of Cassation quashed the part of the judgment concerning the order to destroy copies of the book, in view of a 2003 legislative amendment. It upheld the remainder of the judgment. Akdaş paid the fine in full in November 2004.

Relying on Article 10, Akdaş complained about this conviction and about the seizure of the book. Before the European Court it was not disputed that there had been an interference in Akdaş' freedom of expression, that the interference had been prescribed by law and that it had pursued a legitimate aim, namely the protection of morals. **The Court however found the interference not necessary in a democratic society.**

The Court reiterated that those who promoted artistic works also had "duties and responsibilities", the scope of which depended on the situation and the means used. As the requirements of **morals** vary from time to time and from place to place, even within the same State, the **national authorities** are supposed to be in a better position than the international judge to give an opinion on the exact content of those requirements, as well as on the "necessity" of a "restriction" intended to satisfy them.

Nevertheless, the Court had regard in the present case to the fact that more then a century had elapsed since the book had first been published in France (in 1907), to its publication in various languages in a large number of countries and to the recognition it had gained through publication in the prestigious "La Pléiade" series. **Acknowledgment of the cultural, historical and religious particularities of the Council of Europe's member States could not go so far as to prevent public access in a particular language, in this instance Turkish, to a work belonging to the European literary heritage.** Accordingly, the application of the legislation in force at the time of the events had not been intended to satisfy a pressing social need. In addition, **the heavy fine imposed and the seizure of copies of the book had not been proportionate to the legitimate aim pursued** and had thus not been necessary in a democratic society, within the meaning of Article 10. For that reason, the Court found a violation of Akdaş' right to freedom of expression.

86.- Renaud v. France, 25 February 2010 (Internet, defamation, insult, political debate)

In this case the European Court of Human Rights delivered a judgment regarding defamation and insult on the Internet. The Court is of the opinion that the sharp and polemical criticism of a public figure was part of an ongoing emotional political debate and that the criminal conviction for defamation and insult amounted to a violation of the freedom of expression guaranteed by Article 10 of the European Convention of Human Rights.

The applicant in this case is Patrice Renaud. He is the founder of a local association *('Comité de défense du quartier sud de Sens')* opposing a big construction project planned in the city of Sens. To this end he also initiated a **website**, **sharply criticising the mayor of Sens**, who was supporting and promoting the building project. In 2005, and on appeal in 2006, Renaud was convicted in criminal proceedings for defaming and publicly insulting a citizen discharging a public mandate, on account of remarks concerning the mayor of Sens. On the website he had *inter alia* compared the urban policy of the mayor with the policy of the former Romanian dictator Ceaucescu. Renaud was convicted for defamation because of the specific allegation that the mayor was stimulating and developing delinquency in the city centre in order to legitimise her policy of security and public safety. Also the insinuation that the mayor was illegally putting public money in her own pockets was considered defamatory, while the article on the website in which Renaud had written that the mayor was cynical, schizophrenic and that she was a liar, was considered as public insult. Renaud was convicted to pay a fine of 500 euro and an award of civil damages to the mayor of 1.000 euro.

Relying on Article 10 (freedom of expression), Renaud complained of his conviction before the European Court of Human Rights. The European Court recognises that the applicant, being the chairman of the local association of residents opposing the construction project and being the webmaster of the Internet site of the association, took part **in a public debate while criticizing public officials and politicians.** The Court admits that some of the wordings used by Renaud were **very polemical and virulent**, but that on

the other hand **a mayor must tolerate such kind of criticism** as part of public debate which is essential in a democracy. The Court is of the opinion that when a debate relates to an emotional subject such as the daily life of the local residents and their housing facilities, **politicians must show a specific tolerance towards them being criticised** and that they have to accept "les débordements verbaux ou écrits". The Court considers the allegations of Renaud as **value judgments with a sufficient factual basis** and comes to the conclusion that the French judicial authorities have neglected the interest and importance of freedom of expression in the matter at issue. The conviction of Mr. Renaud as being an interference in his right to freedom of expression does not meet any pressing social need, while at the same time such a conviction risks to have a chilling effect to take part in public debate of this kind. Therefore the European Court finds a violation of Article 10 of the Convention.

87.- Flinkkilä a.o. v. Finland (and Jokitaipale a.o. v. Finland; ltalehti and Karhuvaara v. Finland; Soila v. Finland and Tuomela a.o. v. Finland), 6 April 2010 (journalist, right of privacy, public figure, matter of public concern, reporting criminal case)

The European Court of Human Rights in five judgments of 6 April 2010 has come to the conclusion that Finland has violated the right of freedom of expression by giving too much protection to the right of private life under **Article 8** of the Convention. In all five cases the Court was of the opinion that the criminal conviction of journalists and editors-in-chief and the order to pay damages for disclosing the identity of a public person's partner amounted to an unacceptable interference in the freedom of expression guaranteed by Article 10 of the European Convention of Human Rights.

All applicants in the five cases are journalists, editors-in-chief and publishing companies that have been involved in the publishing in 1997 of a total of nine articles in a newspaper and in several magazines concerning A., the National Conciliator at the time, and B., his female partner. The articles focused primarily on the private and professional consequences for A. of an incident in 1996. This incident had earlier been reported in the Finnish print media and on television, including the revelation of B'. identity. During that incident A. and B. entered A.'s home late at night while A.'s wife was there and, as a result of an ensuing fight, B. was sentenced to a fine and A. was sentenced to a conditional term in prison. A few weeks later a newspaper and several magazines came back on the incident and the court case, this time with more background information, interviews or comment. All articles mentioned B. by name and gave separately other details about her, including her age, name of her workplace, her family relationships and her relationship with A., as well as her picture.

A. and B. requested that criminal investigation be conducted in respect of the journalists for having written about the incident and the surrounding circumstances. The journalists and media companies were sentenced by the domestic courts to **pay fines and damages for invasion of B.'s private l**ife. The Finnish courts found in particular that since B. was not a public figure, the fact alone that she happened to be the girl-friend of a well-known person in society was not sufficient to justify revealing her identity to the public. In addition, the fact that her identity had been revealed previously in the media did not justify the subsequent invasions of her private life. The courts further held that even the mere dissemination of information about the private life of someone was sufficient to cause them damage or suffering. Therefore, the absence of intent on the part of the applicants to hurt B. was irrelevant. The Finnish courts concluded that the journalists and the media had had no right to reveal facts relating to B.'s private life or to publish her picture as they did.

The journalists, editors-in-chief and media companies complained under Article 10 of the Convention about their convictions and the high amounts they had to pay as damages to B. Having examined in earlier case law the domestic Criminal Code provision in question, the European Court found its contents quite clear: the spreading of information, an insinuation or an image depicting the private life of another person, which was conducive to causing suffering, qualified as invasion of privacy. In addition, even the exception stipulated in that provision - concerning persons in a public office or function, in professional life, in a political activity or in another comparable activity - was equally clearly worded. Even though there had been no precise definition of private life in the law, if the journalists or the media had had any doubts about the remit of that term, they should have either sought advice about its content or refrained from disclosing B.'s identity. **In addition, the applicants were**

professional journalists and therefore could not claim not to have known the boundaries of the said provision since the Finnish Guidelines for Journalists and the practice of the Council for Mass Media, albeit not binding, provided even stricter rules than the Criminal Code.

However, there had been no evidence, or indeed any allegation, of factual misrepresentation or bad faith on the part of the applicants. Nor had there been any suggestion that they had obtained information about B. by illicit means. While it had been clear that B. had not been a public figure, she had been involved in an incident together with a well-known public figure with whom she had been in a close relationship. Therefore, B. could have reasonably been taken to have entered the public domain. In addition, the disclosure of B.'s identity had been of clear public interest in view of A.'s conduct and his ability to continue in his post as a high-level public servant. The incident had been widely publicised in the media, including in a programme broadcast nationwide on prime-time television. Thus, the articles in question had not disclosed B.'s identity in this context for the first time. Moreover, even if the events were presented in a somewhat colourful manner to boost the sales of the magazines, this is not in itself sufficient to justify a conviction for breach of privacy. Finally, in view of the heavy financial sanctions imposed on the applicants, the European Court noted that B. had already been paid a significant sum for damages by the television company for having exposed her private life to the general public. Similar damages had been ordered to be paid to her also in respect of other articles published in other magazines by the other applicants listed above, which all stemmed from the same facts. Accordingly, in view of the severe consequences for the applicants against the circumstances of the cases, the European Court held that there had been a violation of Article 10 of the Convention in all five cases.

Under Article 41 of the Convention (just satisfaction), it held that Finland was to pay the applicants sums ranging between EUR 12,000 and EUR 39,000 for pecuniary damage, between EUR 2,000 and EUR 5,000 for non-pecuniary damage, and between EUR 3,000 and EUR 5,000 in respect of costs and expenses.

(See also Ruokanen a.o. v. Finland, 6 April 2010)

88.- Fattulayev v. Azerbaijan, 22 April 2010 (journalist, criticizing government, imprisonment, order for immediate release from prison)

This case concerns the conviction and imprisonment of the founder and chief editor of the newspapers *Gündəlik Azərbaycan*, published in the Azerbaijani language, and *Realny Azerbaijan*, published in the Russian language. **The newspapers were widely known for often publishing articles harshly criticising the Government and various public officials**. At the time of the judgment Eynulla Fatullayev was serving a prison sentence.

In 2007 two sets of criminal proceedings were brought against the applicant in connection with two articles published by him in *Realny Azerbaijan*. The first set of criminal proceedings related to an article and to separate Internet postings. Fatullayev had signed under the article, which he had written after his visit earlier that year to the area of Nagorno-Karabakh and other territories controlled by the Armenian military forces, but denied authorship of the Internet postings. The statements made in the article and the postings differed from the commonly accepted version of the events at the town of Khojaly during the war in Nagorno-Karabakh, according to which hundreds of Azerbaijani civilians had been killed by the Armenian armed forces with the reported assistance of the Russian army. Four Khojaly survivors and two former soldiers involved in the Khojaly battle brought a criminal complaint against Mr Fatullayev for defamation and for falsely accusing Azerbaijani soldiers of having committed an especially grave crime. The courts upheld the claims against the applicant, convicted him of defamation and sentenced him to two years and six months' imprisonment. Fatullayev was arrested in the courtroom and taken to a detention centre on the same day. In addition, in civil proceedings brought against Fatullayev before the above mentioned first set of criminal proceedings, he was ordered to publish a retraction of his statements, an apology to the refugees from Khojaly and the newspaper's readers, and to pay approximately 8,500 euros personally, and another 8,500 euros on behalf of his newspaper, in respect of non-pecuniary damage.

The second set of criminal proceedings related to an article entitled "The Aliyevs Go to War". In it Fatullayev expressed the view that, in order for President Ilham Aliyev to remain in power in Azerbaijan, the Azerbaijani Government had sought the support of the United States (US) in

exchange for Azerbaijan's support for the US "aggression" against Iran. He speculated about a possible US-Iranian war in which Azerbaijan could also become involved, and provided a long and detailed list of strategic facilities in Azerbaijan that would be attacked by Iran if such a scenario developed. He concluded that the Azerbaijani Government should have maintained neutrality in its relations with both the US and Iran, and that it hadn't realised all the dangerous consequences of the geopolitical game it was playing, like for example the possible deaths of Azeris in both Azerbaijan and Iran. The criminal proceedings against the applicant in connection with this article were brought by the Ministry of National Security in May 2007. Before the applicant was formally charged with the offence of threat of terrorism, however, the Prosecutor General made a statement to the press, noting that Mr Fatullayev's article constituted a threat of terrorism. He was found guilty as charged and convicted of threat of terrorism. The total sentence imposed on him was eight years and six months' imprisonment. In his defence speech at the trial and in his appeals to the higher courts, Fatullayev complained that his presumption of innocence was breached as a result of the Prosecutor General's statement to the press; his complaints were summarily rejected.

Relying on Articles 6 and 10, Fatullayev complained of being criminally convicted for several of his published statements and of not having had a fair trial in that connection. Apart from finding breaches of Art. 6 § 1 (right to a fair trial, no impartial tribunal) and Art. 6 § 2 (breach of presumption of innocence) of the Convention, the Court found that the conviction of Fatullayev in both criminal cases amounted to a manifest violation of Art. 10.

With regard to the **first criminal conviction**, the Court acknowledged the very sensitive nature of the issues discussed in the applicant's article and that the consequences of the events in Khojaly were a source of deep national grief. Thus, **it was understandable that the statements made by the applicant may have been considered shocking or disturbing by the public. However, the Court recalled that freedom of information applied not only to information or ideas that were favourably received, but also to those that offended, shocked or disturbed.**

In addition, it was an integral part of freedom of expression to seek historical truth. Various matters related to the Khojaly events still appeared to be open to ongoing debate among historians, and as such should have been a matter of general interest in modern Azerbaijani society. It was essential in a democratic society that a debate on the causes of acts of particular gravity which might amount to war crimes or crimes against humanity should have been able to take place freely. Further, the press had a vital role of a "public watchdog" in a democratic society. Although it ought not to overstep certain bounds, in particular in respect of the reputation and rights of others, the duty of the press was to impart information and ideas on political issues and on other matters of general interest.

The Court considered that the article had been written in a generally descriptive style with the aim of informing Azerbaijani readers of the realities of day-to-day life in the area in question. The public had been entitled to receive information about what was happening in the territories over which their country had lost control in the aftermath of the war. The Fatullayev had attempted to convey, in a seemingly unbiased manner, various ideas and views of both sides of the conflict. The article had not contained any statements directly accusing the Azerbaijani military or specific individuals of committing the massacre and deliberately killing their own civilians.

As regards the Internet postings, the Court accepted that the Fatullayev's authorship of those statements had been proved beyond reasonable doubt. It further accepted that, by making those statements without relying on any relevant factual basis, **he might have failed to comply with the journalistic duty to provide accurate and reliable information**. Nevertheless, taking note of the fact that he had been convicted of defamation, the Court found that those postings had not undermined the dignity of the Khojaly victims and survivors in general and, more specifically, the four private prosecutors who were Khojaly refugees. It therefore held that the domestic courts had not given "relevant and sufficient" reasons for Fatullayev's conviction of defamation.

In addition, the Court held that the imposition of a prison sentence for a press offence would be compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence. As this had not been the case, there had been no justification for the imposition of a prison sentence on Fatul-

layev. There had accordingly been a violation of Article 10 of the Convention in respect of the applicant's first criminal conviction.

With regard to the **second criminal conviction**, the Court reached a similar conclusion. The article "The Aliyevs Go to War" had focused on Azerbaijan's specific role in the dynamics of international politics relating to US-Iranian relations. As such, **the publication had been part of a political debate on a matter of general and public concern.** The applicant had criticised the Azerbaijani Government's foreign and domestic political moves. At the same time, a number of other media sources had also suggested during that period that, in the event of a war, Azerbaijan was likely to be involved and speculated about possible specific Azerbaijani targets for Iranian attacks. The fact that Fatullayev had published a list of specific possible targets, in itself, had neither increased nor decreased the chances of a hypothetical Iranian attack. Fatullayev, as a journalist and a private individual, had not been in a position to influence or exercise any degree of control over any of the hypothetical events discussed in the article. Neither had Fatullayev voiced any approval of any such possible attacks, or argued in favour of them. **It had been his task, as a journalist, to impart information and ideas on the relevant political issues and express opinions about possible future consequences of specific decisions taken by the Government.** Thus, the domestic courts' finding that the applicant had threatened the State with terrorist acts had been arbitrary. The Court considered that Fatullayev's second criminal conviction and the severity of the penalty imposed on him had constituted a **grossly disproportionate restriction of his freedom of expression**. Further, the circumstances of the case had not justified the imposition of a prison sentence on him. There had accordingly been a violation of Article 10 in respect Fatullayev's second criminal conviction.

In application of Article 46 of the Convention (execution of the judgment), the Court noted that Fatullayev was currently serving the sentence for the press offences in respect of which it had found Azerbaijan in violation of the Convention. Having considered unacceptable that Fatullayev still remained imprisoned and the urgent need to put an end to the violations of Article 10, **the Court held, by six votes to one, that Azerbaijan had to release the applicant immediately**. Under Article 41 (just satisfaction) of the Convention, the Court held that Azerbaijan is to pay Fatullayev 25,000 euros (EUR) in respect of non-pecuniary damage and EUR 2,822 in respect of costs and expenses.

(ps: The Azerbaijani authorities have refused so far (July 2011) to execute the order. On the contrary, on 6 July 2010 a Baku district court has convicted Fatullayev of drug possession and sentenced him to 30 months in prison. It is believed that the charge of drug possession has been based on fabricated evidence and was intended to keep Fatullayev in prison despite the ECtHR's ruling)

89.- Andreescu v. Romania, 8 June 2010 (human rights activist, criticizing public official, defamation, press conference, access to personal files held by former secret police, public debate, high level of damages)

The applicant, Gabriel Andreescu, is a well-known **human rights activist** in Romania. He was among those who campaigned for the introduction of the law no. 187 that gives all Romanian citizens the right to inspect the personal files held on them by the *Securitate* (the former Romanian intelligence service and secret police). The law also allows access to information of public interest relating to persons in public office who may have been *Securitate* agents or collaborators. A public agency, the National Council for the Study of the Archives of the *Securitate* (*Consiliul Na?ional pentru Studierea Arhivelor Securit??i*, CNSAS) is responsible for the application of Law no. 187. In 2000 Andreescu submitted two requests to the CNSAS: one to be allowed access to the intelligence file on him personally and the other seeking to ascertain whether or not the members of the Synod of the Romanian Orthodox Church had collaborated with the *Securitate*. He received no reply and organised **a press conference** at which he criticised A.P., a member of the CNSAS, making reference to some of A.P.'s past activities. Andreescu's remarks on A.P.'s past received widespread media coverage.

A.P. made a criminal complaint against Andreescu, accusing him of **insult and defamation**. After being acquitted in first instance, Andreescu was ordered by the Bucharest County Court to pay a criminal fine together with a high amount in compensation for non-pecuniary damage. The appeal Court ruled that he had not succeeded in demonstrating the truth of his **assertion that A.P. had collaborated with the *Securitate***. Furthermore a certificate issued by the CNSAS had meanwhile stated that A.P. had not

collaborated.

Relying on the European Convention of Human Rights and Fundamental Freedoms, Andreescu lodged an application with the European Court of Human Rights about his conviction for defamation. Although the interference by the Romanian authorities with Andreescu's freedom of expression had been prescribed by law and had pursued the legitimate aim of protecting A.P.'s reputation, the European Court considered that the sanction was a violation of Article 10 of the Convention. The Court holds that Andreescu's speech had been made in the specific context of a nationwide debate on a particularly sensitive topic of general interest, namely the application of the law concerning citizens' access to the personal files kept on them by the *Securitate*, enacted with the aim of unmasking that organisation's nature as a political police force, and on the subject of the ineffectiveness of the CNSAS's activities. In that context, it had been legitimate to discuss whether the members of that organisation satisfied the criteria required by law for holding such a position. Andreescu's remarks had been a mix of value judgments and factual elements and he had especially alerted public opinion to the fact that he was voicing suspicions rather than certainties. The Court noted that those suspicions had been supported by references to A.P.'s conduct and to undisputed facts such as his membership of the transcendental meditation movement and the *modus operandi* of *Securitate* agents. **According to the Court, Andreescu had acted in good faith in an attempt to inform the public**. As his remarks had been made orally at a press conference, he had no opportunity of rephrasing, refining or withdrawing them. The European Court is also of the opinion that the Romanian court by convicting Andreescu had paid no attention to the **context in which the remarks at the press conference** had been made. It had certainly not given "relevant and sufficient" reasons for convicting Andreescu. The Court noted furthermore that the **high level of damages** – representing more than 15 times the average salary in Romania at the relevant time – could be considered as a measure apt to deter the media and opinion leaders from fulfilling their role of informing the public on matters of general interest. As the interference with Andreescu's freedom of expression had not been justified by relevant and sufficient reasons, the Court held that there had been a violation of Article 10. It found also a breach of Article 6 § 1 of the Convention (right to fair trial) due to Andreescu's conviction without evidence being taken from him in person, especially after he had been acquitted at first instance. The Court held that Romania was to pay Andreescu 3,500 euros in respect of pecuniary damage, 5,000 euros for non-pecuniary damage and 1,180 euros for costs and expenses.

90.- Sanoma Uitgevers B.V. v. the Netherlands, 14 September 2010 - Grand Chamber (protection of journalistic sources, adequate procedural guarantees, including the guarantee of prior review by a judge or an independent and impartial body)

On 31 March 2009 the Chamber of the Third Section of the European Court of Human Rights (ECtHR) delivered a highly controversial judgment in the case of *Sanoma Uitgevers B.V. v. the Netherlands*. With a 4/3 decision the Court was of the opinion that the order to hand over a CD-ROM with photographs in the possession of the editor-in-chief of a weekly magazine claiming protection of journalistic sources, did not amount to a violation of Article 10 of the European Convention of Human Rights. The finding and motivation of the majority of the Chamber was not only strongly disapproved in the world of media and journalism, but was also firmly criticised by the dissenting judges. *Sanoma Uitgevers B.V.* requested for a referral to the Grand Chamber, this request being supported by a large number of media, NGOs advocating media freedom and professional organisations of journalists. On 14 September 2009 the panel of five Judges decided to refer the case to the Grand Chamber in application of Article 43 of the Convention. By referring the case to the Grand Chamber the panel accepted that the case raised a serious question affecting the interpretation or application of Article 10 of the Convention and/or concerned a serious issue of general importance.

On 14 September 2010, the 17 judges of the Grand Chamber unanimously reached the conclusion that **the order to hand over the CD-ROM to the public prosecutor was a violation of the journalists' rights to protect their sources**. It noted that orders to disclose sources potentially had a detrimental impact, not only on the source, whose identity might be revealed, but also on the newspaper or publication against which the order was directed, whose reputation might be negatively affected in the eyes of future potential sources by the disclosure, and on mem-

bers of the public, who had an interest in receiving information imparted through anonymous sources. Protection of journalists' sources is indeed to be considered "**a cornerstone of freedom of the press**, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result **the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected**". In essence the Grand Chamber is of the opinion that the right to protect journalistic sources should be safeguarded by sufficient procedural guarantees, including the guarantee of **prior review by a judge** or an independent and impartial decision-making body, before the police or the public prosecutor have access to information capable of revealing such sources. Although the public prosecutor, like any public official, is bound by requirements of basic integrity, in terms of procedure he or she is a "party" defending interests potentially incompatible with journalistic source protection and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests. As in the case of *Sanoma Uitgevers B.V. v. The Netherlands* an *ex ante* guarantee of a review by a judge or independent and impartial body was not existing, the Grand Chamber is of the opinion that **"the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources**". Emphasizing the importance of the protection of journalistic sources for press freedom in a democratic society the Grand Chamber of the European Court finds a violation of Article 10 of the Convention. The judgment implies that member states of the Convention shall build in procedural safeguards in their national law in terms of a judicial review or other impartial assessment by an independent body based on clear criteria of subsidiarity and proportionality and prior to any disclosure of information capable of revealing the identity or the origin of journalists' sources.

91.- Polanco Torres and Movilla Polanco v. Spain, 21 September 2010 (protection of honour, allegations of unlawfull dealings, obligation to verify factual statements, journalist acted in good faith using effective possibilities to verify information, no violation of the right to protection of reputation)

In this case the European Court was again called upon to consider the positive obligations of a member state to adequately protect the right to protection of reputation under Article 8 of the European Convention. The applicant was the wife of a senior judge recently deceased. In an article published in the *El Mundo* newspaper it was alleged that the **judge's wife had engaged in unlawful dealings with a company involving "dirty money".** The **article was based on accounting data received from an anonymous source**. *El Mundo* had **verified** the accounting data with the company accountant who had recently been dismissed. The accountant had verified the information, and confirmed that the financial transactions at issue had been unlawful. The article also contained **a statement from the applicant denying any links with the company at issue**.

The applicant and her husband brought proceedings against the newspaper for the protection of their honour. At first instance, a district court held that there had been an unlawful interference with the right of the applicant to respect for her honour, as the journalist had based the article solely of the statements of the accountant, without additional verification. On appeal, however, the Constitutional Court quashed the judgment, finding that the journalist has used all effective possibilities to verify the information by contacting the accountant. Moreover, the fact the accountant had been dismissed from the company did not affect his reliability, while the Constitutional Court also had regard to the applicant's statement of denial being published in the article.

Polanco Torres and Movilla Polanco made an application to European Court claiming that the Constitutional Court had failed in its positive obligations under Article 8 to adequately protect their right to protection of their honour and reputation. The Court firstly noted the article concerned a subject of general interest. However, given that the article also targeted a specific individual, the journalist had a **duty to ensure that the article had a sufficient factual basis**.

Moreover, the Court emphasised that the article had the characteristics of a neutral report, including the verification of the accounting data by the accountant, and a denial by the person accused.

The Court considered that the essential question before it was whether the journalist had **acted in good faith** and whether he had **fulfilled the obligation – incumbent on all journalists – to verify factual statements**. The Court noted that by verifying the authenticity of the accounting data with the former accountant of the company, the journalist had used all effective possibilities to verify his information. Furthermore, contacting the applicant to give her the opportunity to comment on the information at issue showed the journalist had fulfilled his obligation of diligence. Finally, the Court agreed with the Constitutional Court that the **lawfulness of the means by which the information had been obtained was not relevant** in determining whether there had been a breach of the right to respect for private life. The European Court concluded that **the journalist's right to impart information in the general interest** had to be given more weight than the applicant's right to protection of her reputation and honour, and consequently, there had been **no violation of Article 8**.

92.- Saaristo a.o. v. Finland, 12 October 2010 (private life of political communications manager, right to protection of privacy)

Saaristo a.o. v. Finland concerns the scope of protection of the private life of a presidential candidate's communications manager. The applicants in this case were a journalist and the editor, respectively, of the newspaper *Ilta-Sanomat*. They were convicted of a violation of privacy following the publication of an article entitled "*The ex-husband of [R.U.] and the person in charge of communications for the Aho campaign have found each other*." The article described how the former husband of a political reporter had found a new partner, O.T., a communications manager of one of the presidential candidates, Esko Aho. The article contained details of O.T.'s private life, including her family life, and photographs.

Following a request from the communications manager, the public prosecutor brought criminal charges against the applicants for **invasion of privacy**. The applicants were convicted for having violated O.T.'s private life, and were fined 270 EUR and 650 EUR respectively. The applicants were also jointly ordered to pay damages and costs to O.T. amounting to nearly 11,500 EUR. The Supreme Court upheld the convictions on appeal, holding that despite O.T.'s position as a communications manager in a presidential campaign, publication of private details was not justified by the public's need to receive information nor by the important interests of society.

The journalist and the editor of Ilta-*Sanomat* made an application to the European Court claiming a violation of their right to freedom of expression guaranteed by Article 10 of the European Convention. The Court noted at the outset that **the facts in the article were presented in an objective manner, and there had been no misrepresentation or bad faith**. Moreover, the information had not been obtained by subterfuge or other illicit means.

The Court considered that O.T. was not a completely private person, making reference to her function in the presidential election campaign, and her role in publicly promoting the goals and objectives of the candidate. Moreover, the Court stated that, when taking up her duties as a communications officer for one of the two presidential candidates, she must have understood that her own person would also attract public interest and that the **scope of her private life would become somewhat more limited**. Therefore, the European Court held that the Finnish Supreme Court had not given sufficient weight to the political nature of O.T.'s functions and to the public context in which she discharged those functions.

The European Court held that the article had a direct bearing on matters of public interest, as her recruitment to the presidential campaign had attracted political interest, and was an important matter of public interest in the form of political background information.

The Court also noted the severity of the sanctions, describing them as substantial, given that the maximum compensation to victims of serious violence was 17,000 EUR. **The Court concluded that the reasons relied on by the domestic courts, although relevant, were not sufficient to show that the interference was necessary in a democratic society**. Moreover, the sanctions imposed on the applicants were **disproportionate.** There had therefore been a violation of Article 10.

93.- Mouvement Raëlien Suisse v. Switzerland, 13 January 2011 (ban on posters, regulation of the public space, reference to controversial website)

The applicant association in this case was the Swiss branch of the Raëlien Movement, an international association whose members believe life on earth was created by extraterrestrials. The association sought to conduct a poster campaign, with the poster featuring extraterrestrials, flying saucers, and the words "*The message from the extraterrestrials. At last, science is replacing religion*". The poster also included the website address of the Raëlien Movement. The police authorities refused permission for the poster campaign on the grounds of public order and morals, and the domestic courts upheld this decision.

The Swiss courts held that although the poster itself was not objectionable, because the Raëlien website address was included, the Courts had to have regard to documents published on the Raëlien website. The courts held the poster campaign should be banned on the basis that: (a) there was a link on the website to a company which provided cloning services; (b) the association advocated "geniocracy" i.e. government by those with a higher intelligence; and (c) there had been allegations of sexual offences against some members of the association.

Mouvement Raëlien made an application to the European Court arguing that the ban on its poster campaign was a violation of its right to freedom of expression under Article 10 of the European Convention. At the outset, the Court stated that the case raised a novel issue which had not been considered before by the Court, namely whether the domestic authorities should allow the applicant association disseminate its ideas through an advertising campaign by making the "*domaine public*" available.

Importantly, the Court held that the **domestic authorities have a wide margin of appreciation where the authorities wish to regulate the use of the "*domaine public*"**, accepting the Government's argument that allowing the poster campaign might have implied that it endorsed or tolerated the views of the Raëlien Movement. Moreover, the Court reasoned that because the Raëlien website was available to minors, the impact of the posters was greater, and thus there was an increased state-interest in banning the poster campaign. The Court then approved the carefully reasoned ("*soigneusement motivé*") decisions of the Swiss courts. The reasons given were relevant and sufficient, with the Court finding it legitimate to have regard to the Raëlien Movement's views on cloning, and finding the allegations of sexual offences disturbing.

Finally, the Court held that the ban was a proportionate limitation on the right to freedom of expression, as the ban was limited to the "*domaine public*", and **other means of communicating were available to the Raëlien Movement**. Thus, the Court concluded that there had been no violation of Article 10. Judges Rozakis and Vaji? dissented, noting that the association was a completely lawful association, and that Article 10 not only protects the substance of ideas and information expressed, but also the form in which they are conveyed.

94.- Hoffer and Annen v. Germany, 13 January 2011 (anti-abortion pamphlets, criminal defamation, reference to Holocaust)

The applicants in *Hoffer and Annen v. Germany* were anti-abortion activists who had distributed pamphlets outside a medical clinic in Nuremburg. The pamphlets urged support for ending abortion in Germany; however, the pamphlets also named a doctor at the clinic, Dr. F., describing him as a "*Killing specialist for unborn children*". Moreover, the back page of the pamphlet included the following statements: "*Stop the murder of children in their mother's womb on the premises of the Northern medical centre. Then: Holocaust, Today: Babycaust".*

The doctor and the medical centre initiated criminal proceedings for defamation against the applicants. At first instance, the German courts held that the actions should fail, as the pamphlet was not intended to debase Dr. F., and only conveyed the applicants' general rejection of abortion. However, on appeal, it was held that the statement "*Then: Holocaust /Today: Babycaust"* had to be interpreted as putting the lawful activity of Dr. F. on a level with the Holocaust, qualifying him as a mass murderer, which amounted to **abusive insult**. The applicants were convicted of **defamation** and fined.

Hoffer and Annen made an application to the European Court, arguing that the convictions violated their right to freedom of expression under Article 10 of the Convention. The Court applied its usual preliminary assessment under Article 10: it considered that the convictions amounted

to an "interference" with the applicants' freedom of expression, were "prescribed by law", and pursued the legitimate aim of protecting "the reputation or rights of others". The main question was therefore whether the convictions were "necessary in a democratic society".

Firstly, the Court noted that it must have regard to the special degree of protection afforded to expression of opinions which were made in the course of a debate on matters of public interest. Secondly, the Court noted that the German courts had accepted that all other statements in the pamphlet, except the Holocaust reference, were acceptable elements of public debate.

However, the Court noted that in the view of the domestic courts the applicants, by comparing the performance of abortions to the mass-homicide committed during the Holocaust, had violated the physician's **personality rights** in a particularly serious way and could have been expected to express their criticism in a way which was less detrimental to the physician's honour.

The Court further noted that the Federal Constitutional Court acknowledged the fact that the applicants' statement could be interpreted in different ways, but considered that all possible interpretations amounted to a very serious violation of the physician's personality rights.

Finally, the Court observed that **the impact an expression of opinion has on another person's personality rights cannot be detached from the historical and social context in which the statement was made. The reference to the Holocaust must also be seen in the specific context of the German past.**

Thus, the Court concluded that there had been **no violation of Article 10** as the convictions had represented an **adequate balance** between the applicants' right to freedom of expression and the doctor's personality rights.

95.- MGN Limited v. the United Kingdom, 18 January 2011 (celebrity, right of privacy, photographs, disproportionate legal costs)

Ten years ago, in 2001, the newspaper *Daily Mirror* published an article on its front page under the title: "Naomi: I am a drug addict". Another longer article inside the newspaper elaborated top model Naomi Campbell's addition treatment, illustrated by photos taken secretly near the Narcotics Anonymous centre she was attending at the time. As the newspaper continued to publish more articles and new pictures related to her attendance at Narcotics Anonymous, Ms. Campbell sued the *Daily Mirror* for breach of her privacy. At a final stage of the domestic proceeding the House of Lords found that the publication of the articles could have been justified as a matter of public interest, as Ms Campbell had previously publicly denied drug use. The publication of the pictures however, in combination with the articles, had breached her right to respect of her private life. Apart from a modest award of damages of 3500 GBP, the Daily Mirror's publishing group, MGN, was ordered to pay Ms. Campbell's legal costs, included the 'success fees' agreed between Ms Campbell and her lawyers. The total amount of the legal costs was more than 1 million GBP.

Relying on Article 10 of the European Convention MGN lodged an application with the European Court of Human Rights, complaining that the finding by the British courts that it had breached Ms Campbells' privacy disregarded the right to freedom of expression. MGN also argued that the requirement to pay disproportionately **high success fees** amounted to a violation of Article 10 of the Convention. This part of the application was supported by third parties, such as Open Society Justice Initiative, Media Legal Defence Initiative, Index on Censorship and Human Rights Watch, all referring to the chilling effect of high costs in defamation proceedings in the United Kingdom on NGOs and small media organizations.

Regarding the breach of privacy the European Court recalled that **a balance had to be made between the public interest in the publication of the articles and the photographs of Ms Campbell and the need to protect her private life**. By six votes to one the Court holds that there has been no breach of Article 10. The Court agrees with the reasoning by the House of Lords that the public interest had been already satisfied by the publication of the articles, while **adding the photographs was a disproportionate breach of her right to respect for her private life**. Therefore, the interference in the right to freedom of expression of the *Daily Mirror* was considered necessary in a democratic society in order to protect the rights of Ms Campbell.

However, **the order to pay the success fees, up to more than 365.000 GBP**, is considered by the European Court as a **disproportionate interfer-**

ence in the right to freedom of expression, having regard to the legitimate aims sought to be achieved. The Court took into consideration that the system of recoverable success fees may have a chilling effect on media reporting and hence on freedom of expression. Unanimously the Court found a violation of Article 10 of the Convention.

96.- Otegi Mondragon v. Spain, 15 March 2011 (insult of the King, value judgments, provocative language, public debate of general interest, disproportionate prison sentence)

In a judgment of 15 March 2011 the European Court of Human Rights has decided that an elected representative's conviction for causing serious insult to the King of Spain was contrary to his freedom of expression. The case concerns the criminal conviction of a politician of a Basque separatist political party, Mr. Otegi Mondragon, following comments made to the press during an official visit by the King to the province of Biscay. During that press conference Mondragon, as spokesperson for his parliamentary group *Sozialista Abertzaleak,* stated in reply to a journalist's question that the visit of the King to Biscay was a "genuine political disgrace". He said that the King, as "supreme head of the Guardia Civil (police) and of the Spanish armed forces" was the person in command of those who had tortured those detained in a recent police operation against a local newspaper, amongst them the main editors of the newspaper. Mondragon called the King "he who protects torture and imposes his monarchical regime on our people through torture and violence". Mondragon was convicted for insult of the King on the basis of Article 490 § 3 of the Criminal Code and sentenced to one year's imprisonment and suspension of his right to vote during that period. The Spanish courts qualified the impugned comments as value judgments and not statements of fact, affecting the inner core of the King's dignity, independently of the context in which they had been made**.** The European Court of Human Rights however considers this criminal conviction a violation of Article 10 of the Convention, as **Mondragon's remarks had not been a gratuitous personal attack against the King, nor did they concern his private life or his personal honour**. While the Court acknowledged that Mondragon's **language could be considered provocative, it reiterated that it was permitted, in the context of a public debate of general interest, to have recourse to a degree of exaggeration, or even provocation**. The King being the symbol of the State cannot be shielded from legitimate criticism, as this would amount to an **over-protection of Heads of State in a monarchical system**. The phrases used by Mondragon, addressed at journalists during a press conference, concerned solely the King's **institutional responsibility** as Head and symbol of the State apparatus and of the forces which, according to Mondragon, had tortured the editors of a local newspaper. The comments in issue had been made in a public and political context that was outside the "essential core of individual dignity" of the King. The European Court further emphasized the particular severity of the sentence. While the determination of sentences was in principle a matter for the national courts, a **prison sentence** imposed for an offence committed in the area of **political discussion** was compatible with freedom of expression only in extreme cases, such as hate speech or incitement to violence. Nothing in Mondragon's case justified such a sentence, which inevitably had **a dissuasive effect**. Thus, even supposing that the reasons relied upon by the Spanish courts could be accepted as relevant, they were not sufficient to demonstrate that the interference complained of had been "necessary in a democratic society". The applicant's conviction and sentence were thus disproportionate to the aim pursued, in violation of Article 10 of the Convention.

97.- RTBF v. Belgium, 29 March 2011 (interim injunction, constitutional guarantees against prior restraint, legal basis)

In a judgment of 29 March 2011 the European Court found a violation of Article 10 of the European Convention on Human Rights in the case *Radio-télévision belge de la communauté française (RTBF) v. Belgium*. The case concerned an interim injunction ordered by an urgent-applications judge against the RTBF, preventing the broadcasting of a programme on medical errors and patients' rights. The injunction prohibited the broadcasting of the programme until a final court decision in a dispute between a doctor named in the programme and the RTBF. As the injunction constituted an interference by the Belgian judicial authorities in the RTBF's freedom of expression, the European Court in the first place had to ascertain whether that interference had a legal basis. Whilst **Article 10 does not prohibit prior restraints on broadcasting, such restraints require however a particularly strict legal frame-**

work, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse. As news is a perishable commodity, delaying its publication, even for a short period, might deprive it of all its interest. In ascertaining whether the interference at issue had a legal basis, the Court observed that the Belgian Constitution authorized the punishment of offences committed in the exercise of freedom of expression only once they had been committed and not before. Although some provisions of the Belgian Judicial Code permitted in general terms the intervention of the urgent-applications judge, there was discrepancy in the case law as to the possibility of preventive intervention in freedom of expression by that judge. **The Belgian law was thus not clear and there was no consistent jurisprudence that could have enabled the RTBF to foresee, to a reasonable degree, the possible consequences of the broadcasting of the programme in question**. The European Court observed that, without precise and specific regulation of preventive restrictions on freedom of expression, many individuals fearing attacks against them in television programmes – announced in advance – might apply to the urgent-applications judge, who would choose different solutions to their cases and this would not be conducive to preserving the essence of the freedom of imparting information. Although the European Court considers **a different treatment between audiovisual and print media not unacceptable as such**, e.g. regarding the licensing of radio and television, it did not agree with the Belgian Court of Cassation refusing to apply the essential constitutional safeguard against censorship on broadcasting. According to the European Court it appeared artificial and there **was no clear legal framework to allow prior restraint as a form of censorship on broadcasting.** The Court is of the opinion that the legislative framework, together with the case-law of the Belgian courts did not fulfill the condition of foreseeability required by the Convention. As the interference complained of could not be considered to be prescribed by law, there had thus been a violation of Article 10 of the Convention. The judgment contains an important message to all member states of the European Convention on Human Rights: prior restraints require a particularly strict, precise and specific legal framework, ensuring both tight control over the scope of bans both in print media and in audiovisual media services, combined with an effective judicial review to prevent any abuse by the domestic authorities.

98.- Kasabova v. Bulgaria, 19 April 2011, and Bozkhov v. Bulgaria, 19 April 2011 (disproportionate sanctions on journalists, criminal defamation)

The applicants in these two cases were journalists who had been convicted for defamation following articles in two different newspapers criticising four experts of the Burgas inspectorate of the Ministry of Education. The four experts were members of a school admissions commission set up to compile lists of students to be accepted into elite secondary schools on special medical grounds. The articles contained allegations that the experts in question had admitted children based on false diagnoses in return for bribes.

The four experts brought **criminal defamation** proceedings against the journalists. The Bulgarian courts held that the applicants had failed to sufficiently research their articles and had thus failed to act as responsible journalists. The Bulgarian courts convicted the journalists of criminal defamation, and ordered the applicants to pay 3,800 EUR and 3,200 EUR respectively in fines, damages and costs.

The journalists made an application to the European Court claiming their conviction and punishment was a violation of Article 10. The Court first reiterated that it must apply the **most careful scrutiny** when the sanctions imposed by a national authority are **capable of discouraging** the participation of the press in **debates over matters of legitimate public concern**.

The Court added that if the national courts apply an **overly rigorous approach** to the assessment of journalists' professional conduct, the latter could be **unduly deterred** from discharging their function of keeping the public informed. The courts must therefore take into account the likely impact of their rulings not only on the individual cases before them **but also on the media in general**.

The Court noted that the domestic courts had ruled that the only way of corroborating the allegation that someone had committed a criminal offence was to show that he stood convicted of it. The Court stated that it could not condone such a position, holding that while a final conviction in principle amounts to incontrovertible proof that a person has committed an offence, to circumscribe in such a way the manner of proving allegations of criminal conduct in the context of a libel case is plainly unreasonable. **Allegations**

in the press cannot be put on an equal footing with those made in criminal proceedings.

However, the Court held that the domestic courts' findings that the journalists had failed to sufficiently research their articles was not manifestly unreasonable. In relation to the criminal law sanctions imposed on Kasabova and Bozhkov, the Court stated that nature and severity of the penalties **must not be such as to dissuade the press from taking part in the discussion of matters of legitimate public concern**.

The Court noted that the fines, together with the damages and costs awarded, were equivalent to **almost seventy minimum monthly salaries** of the first applicant, and represented **fifty-seven minimum monthly salaries** of the second applicant. Moreover, the Court cited evidence that demonstrated the applicants **struggled for years to pay the sums** in full. Consequently, the Court concluded that the sanctions imposed by the domestic courts were **disproportionate,** and there had therefore been a violation of Article 10.

99.- Editorial Board of Pravoye Delo and Shtekel v. Ukraine, 5 May 2011 (liability for journalistic material obtained from Internet)

The applicants were the editorial board and editor-in-chief of a local newspaper *Pravoe Delo*. The newspaper published an **anonymous letter** allegedly written by an employee of the Ukrainian Security Service, which contained allegations that senior officials of a regional department of the Security Service has been engaging in unlawful and corrupt activities, with links to organised crime. The letter stated that G.T., the head of Ukrainian Thai Boxing Federation, was "a member of the organised criminal group ... is a coordinator and sponsor of murders". The **letter had been downloaded from a news website**, and was published by the newspaper without modification, and included a reference to the source of the letter.

Subsequently, G.T. instituted defamation proceedings against the newspaper. The domestic courts held that the publication of the letter had been **defamatory.** It was also held that there were no grounds to release the applicants from civil liability under the Press Act, as the internet site from which the letter had been downloaded was not printed media registered pursuant to the Press Act. The applicants were **ordered to publish a retraction and an apology, and awarded damages** of 15,000 UAH (33,060 EUR).

The newspaper's board and the editor-in-chief made an application to the European Court claiming a violation of their right to freedom of expression guaranteed under Article 10 of the European Convention. It was claimed that there was an absence of legal grounds under Ukrainian law for an obligation to apologise in defamation cases, and also that there was no provision in Ukrainian law for allowing newspapers to publish material from the Internet without incurring liability.

With regard to the first issue, the European Court held that the domestic court's order to publish an apology was not specifically provided for in domestic law, and therefore violated Article 10, as it was not "**prescribed by law".** In relation to the second issue, the Court first noted that the published letter was a verbatim reproduction of material from a publicly accessible internet newspaper. The Court also noted that the article referenced the source of the material, and contained comments from editorial board formally distancing themselves from the content.

The Court referred to the Ukrainian Press Act which grants journalists immunity from civil liability for verbatim reproduction of material published in the press, and the Court noted that this legislation generally conforms to **the principle of journalists' freedom to disseminate statements made by others**.

However, the Court also observed that there existed no domestic regulation on State regulation of internet media, and the Press Act did not contain any provision on the status of internet-based media or the use of information from the internet. The Court held that having regard to the role Internet plays in the context of professional media activities and its importance for the exercise of the right to freedom of expression generally, the absence of a sufficient legal framework at the domestic level allowing journalists to **use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a "public watchdog".**

The Court concluded that given the lack of adequate safeguards in the domestic law for journalists using information obtained from the Internet, the applicants **could not have foreseen to the an appropriate degree** the consequences the publication of the letter entailed. Therefore,

there had been a violation of Article 10 as the interference had not been "prescribed by law".

100.- Mosley v. the United Kingdom, 10 May 2011 (public person, right of privacy, photographs and video, no prior notification)

In this case the European Court of Human Rights decided that the right of privacy guaranteed by Article 8 of the European Convention on Human Rights **does not require media to give prior notice of intended publications to those who feature in them.** The applicant in this case is Max Rufus Mosley, the former president of the International Automobile Federation. In 2008, the Sunday newspaper *News of the World* published on its front page an article entitled "F1 boss has sick Nazi orgy with 5 hookers", while several pages inside the newspaper were also devoted to the story which included still photographs taken from video footage secretly recorded by one of the participants in the sexual activities. An edited extract of the video, in addition to still images, were also published on the newspaper's website and reproduced elsewhere on the internet. Mr Mosley brought legal proceedings against the newspaper claiming damages for breach of confidence and invasion of privacy. In addition, he sought an injunction to restrain the *News of the World* from making available on its website the edited video footage. The High Court refused to grant the injunction because the material was no longer private as it had been published extensively in print and on the Internet. In subsequent privacy proceedings the High Court found that there was no public interest and thus no justification for publishing the litigious article and accompanying images, which had breached Mr Mosley's right to privacy. The court ruled that *News of the World* had to pay to Mr. Mosley 60,000 GBP in damages.

Relying on Article 8 (right to private life) and Article 13 (right to an effective remedy) of the European Convention, Mr Mosley complained that, despite the monetary compensation awarded to him by the courts, **he remained a victim of breach of his privacy as a result of the absence of a legal duty on the *News of the World* to notify him in advance of their intention to publish material concerning him, thus giving him the opportunity to ask a court for an interim injunction and prevent the material's publication**. The European Court found indeed that the publications in question had resulted in a flagrant and unjustified invasion of Mr Mosley's private life. The question which remained to be answered was whether a legally binding pre-notification rule was required. The Court recalled that States enjoy a certain margin of appreciation in respect of the measures they put in place to protect people's right to private life. In the United Kingdom, the right to private life had been protected with a number of measures: there was a system of self-regulation of the press; people could claim damages in civil court proceedings; and, if individuals were aware of an intended publication touching upon their private life, they could seek an interim injunction preventing publication of the material. **As a pre-notification requirement would inevitably also affect political reporting and serious journalism, the Court stressed that such a measure required careful scrutiny.** In addition, a parliamentary inquiry on privacy issues had been recently held in the United Kingdom and the ensuing report had rejected the need for a pre-notification requirement. The Court further noted that Mr Mosley had not referred to a single jurisdiction in which a pre-notification requirement as such existed, nor had he indicated any international legal texts requiring States to adopt such a requirement. Furthermore, as any pre-notification obligation would have to allow for an exception if public interest was at stake, a newspaper should be able to opt not to notify an individual if it believed that it could subsequently defend its decision on the basis of the public interest in the information published. **The Court observed in that regard that a narrowly defined public interest exception would increase the chilling effect of any pre-notification duty.** Anyway, a newspaper could choose under a system in which a pre-notification requirement was applied, to run the risk to decline to notify, preferring instead to pay a subsequent fine. **The Court emphasized that any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it**. But at the same time the Court emphasized that particular care had to be taken when examining constraints which might operate as a form of censorship prior to publication. Although punitive fines and criminal sanctions could be effective in encouraging pre-notification, that would have a chilling effect on journalism, even political and investigative reporting, both of which attracted a high level of protection under the Convention. That ran the risk of being incompatible with the Convention requirements of freedom of expression guaranteed by Article 10 of the Convention. Having regard to **the chill-**

ing effect to which a pre-notification requirement risked giving rise, to **the doubts about its effectiveness and to the wide margin of appreciation** afforded to the United Kingdom in that area, the Court concluded that Article 8 did not require a legally binding pre-notification requirement.

European Court of Human Rights (ECtHR)

FRESSOZ AND ROIRE v. FRANCE, 21 JANUARY 1999
APPLICATION NO. 29183/95 – GRAND CHAMBER

THE FACTS

I. The circumstances of the case

1. Mr Roger Fressoz and Mr Claude Roire, who are French nationals, lived in Paris at the material time. Mr Fressoz was born in 1921 and is a former publishing director of the weekly satirical newspaper *Le Canard enchaîné*. Mr Roire was born in 1939 and is a journalist on *Le Canard enchaîné*.

A. The article at the heart of the case

2. September 1989 was a period of industrial unrest within the Peugeot motor company. The workforce's demands included pay rises, which the management, led by the company chairman and managing director Mr Jacques Calvet, refused to award.

3. On 27 September 1989, *Le Canard enchaîné* published an article by Mr Roire under the headline:

"Calvet turbo-charges his salary"

with the subhead:

"His tax forms reveal more than he does. The Peugeot boss has given himself a 45.9% rise over the last two years."

The article itself included the following:

"When Jacques Calvet appeared on the Antenne 2 programme '*L'heure de vérité*' in October 1988, he refused to answer a question about his pay. This is seen as a public-relations blunder on the part of the Peugeot boss, but the *Canard* is now in a position to put it right, thanks to the famous M.D.'s three most recent tax-assessment forms, which have come into our hands by chance. At the time of the broadcast, he was earning 185,312 francs net per month.

These documents show that, between 1986 and 1988, Calvet's total salary (plus benefits in kind and sickness benefit) rose by 45.9%. According to Peugeot's own figures, the average pay of the group's 158,000 workers rose by 6.7% over the same two years – in other words, almost seven times less than the boss's.

M.D.'s blues

Calvet has turned Peugeot around in spectacular style, but in a recent interview on Antenne 2 he said he was under stress due to his group's position in the face of the Japanese offensive. It would appear that this painful psychological crisis has not prevented him from swelling his income – though it should be noted that Calvet is far from Number 1 in the hit-parade of chief executives' salaries.

In 1987 he awarded himself a 17% increase in his annual pay, bringing it to 1,786,171 francs – that is, 148,847 francs a month. Why? Probably because the Revenue had grabbed a big slice of his previous year's income. And this dreadful tax-pay spiral continued its destructive course the following year. In 1988, in order to scrape by, Calvet was forced to give himself another rise, of 24%. His salary that year came to 2,223,747 francs, i.e. 185,312 francs a month after deductions..."

The article was illustrated by a box reproducing a photocopy of that part of each of the three notices of assessment to tax which detailed Mr Calvet's "total taxable income" and showed the amounts he had received by way of "salary, benefits in kind and sickness benefit". Each of the three totals was circled in pencil.

B. The criminal proceedings against the applicants

1. The investigative stage

4. On 2 October 1989 Mr Calvet lodged a criminal complaint against a person or persons unknown, together with an application to join the proceedings as a civil party claiming damages, with the senior investigating judge at Paris *tribunal de grande instance*. He submitted that the events in question must have involved the unlawful removal and possession of the originals or copies of documents normally held by the tax authorities and amounted to the offences of misappropriation of deeds or documents by a public servant, breach of professional confidence, misappropriation of documents for the time needed to reproduce them and handling unlawfully obtained documents.

5. On 5 October 1989 the public prosecutor applied to the investigating judge for an investigation to be opened into allegations of theft, breach of professional confidence, unlawful removal of deeds or documents by a public servant and handling unlawfully obtained goods.

6. On 25 October 1989 the Minister for the Budget also lodged a criminal complaint,

together with an application to join the proceedings as a civil party claiming damages, against a person or persons unknown for unlawful removal of government documents and breach of professional confidence. On 11 December 1989 the public prosecutor requested that a further investigation be opened.

7. In the course of the investigation, an analysis of the computer reference number on the copy documents in Mr Roire's possession revealed that they were photocopies of the part of the tax-assessment notice which is kept by the tax authorities and is not intended to leave their premises. An inspection of the premises confirmed that the locks on the cabinets containing the documents had not been forced and that the alarm protecting the premises outside working hours had not been activated.
An examination of the original of Mr Calvet's tax assessment for 1988 revealed a palm-print belonging to the Divisional Director of Taxes. However, it was asserted that this person had called up the relevant tax file on 27 September 1989 at the request of the Head of the Revenue and the Director of Taxes for the *département*. The person or persons responsible for unlawfully removing the document from the tax authorities' premises could not be identified, with the result that no one was ever charged under that head.

8. On 8 March 1991 the applicants were charged with handling copies of notices of assessment to tax obtained through a breach of professional confidence, unlawful removal of deeds or documents and theft.

9. On 20 December 1991 the public prosecutor filed a report recommending that no one should be charged with the offences of theft or breach of professional confidence, that all the charges against the first applicant should be dropped and that the second applicant should be committed for trial before the Criminal Court on charges of handling photocopies of Mr Calvet's tax assessments obtained through a breach of professional confidence by an unidentified tax official.

10. On 27 January 1992 the investigating judge ordered that, as no culprit had been identified, the proceedings for theft and breach of professional confidence should be discontinued. The judge committed both applicants for trial before the Criminal Court on charges of handling confidential information concerning Mr Calvet's income obtained through a breach of professional confidence by an unidentified tax official and of handling stolen photocopies of Mr Calvet's tax assessments.

2. In Paris Criminal Court

11. The applicants submitted two arguments in their defence: first, that the conditions for publishing directors to be criminally liable, laid down in section 42 of the Freedom of the Press Act of 29 July 1881 (see paragraph 25 below) did not apply and, second, that the elements of the offences with which they had been charged, as defined in Article 460 of the Criminal Code (see paragraph 27 below), were not made out in their case.

12. At the trial Mr Fressoz stated that the first time he had seen the extracts from the tax assessments printed in the newspaper was when he looked at the proofs before personally passing the article for press. He said he had asked Mr Roire "whether his documents were sound in journalistic terms", that is to say, "whether the information was accurate and had been checked". He acknowledged that, as a general rule, passing copy for press was the responsibility of an editorial assistant, who, "if there is a problem, consults the editor and, in the last resort, the publishing director".
The second applicant stated that the photocopies of the tax assessments had been sent anonymously in an envelope addressed to him by name, about a fortnight before they were used in the paper. He explained that he had "checked the plausibility" of the information in the documents, in particular by looking up the level of Mr Calvet's remuneration in specialist works including *Fortune France*. He said that he had also checked with various persons to ensure that the documents were photocopies of "genuine" tax-assessment notices. He specified that he had also verified that they really were tax-authority documents, adding that once it appeared that there was no proof that they had been obtained unlawfully, "the overriding consideration was the documents' significance".

13. In a judgment of 17 June 1992, Paris Criminal Court acquitted the applicants, holding that the principal offences of theft and breach of professional confidence had not been made out because it had proved impossible to identify who had disclosed the documents or to establish the circum-

stances in which the offences had been committed.
In relation to the offence of breach of professional confidence, the court held as follows:

"...
In the instant case, while it has been established that the originals of the documents in question are notices of assessment to tax held on Mr Calvet's tax file, it cannot be inferred from this that the person guilty of wrongfully taking them for the time needed to photocopy them, or of disclosing them to third parties, or of divulging the information contained in them, necessarily fell within one of the categories of person defined in the above-mentioned provision [Article L. 103 of the Code of Tax Procedure]; since the tax authorities themselves have suggested that the perpetrator might be 'someone from outside'... – whatever the security regulations at the time.

The fact that the status and professional functions of the person responsible for the disclosure are unknown therefore rules out any possibility of proving one of the essential elements of the offence of breach of professional confidence.
Consequently, there is no formal proof that this offence was committed, so that the charge against the defendants of handling the fruits of a breach of professional confidence has not been made out..."

In relation to the theft charge, the court held:

"... In particular, it has not been shown that the person who originally copied the documents had any unlawful intention or had such an intention at the time of taking the documents.
Hence, without further rehearsing the numerous questions remaining unanswered concerning how these documents found their way into Mr Roire's hands, we find that the elements of the offence of theft have not been sufficiently proved.
Unless it can be precisely established that, in the first place, an act defined as a serious crime (*crime*) or other major offence (*délit*) was committed, and its elements can be made out, the prerequisite for an offence of handling is lacking, and the defendant must be acquitted."

14. On 25 and 26 June 1992 respectively, the public prosecutor and the civil parties claiming damages appealed.

3. In Paris Court of Appeal

15. In a judgment of 10 March 1993, Paris Court of Appeal reversed the judgment and found the applicants guilty of handling photocopies of Mr Calvet's tax returns obtained through a breach of professional confidence by an unidentified tax official. Mr Fressoz and Mr Roire were sentenced to, respectively, fines of 10,000 and 5,000 French francs (FRF) and ordered, jointly and severally, to pay Mr Calvet FRF 1 by way of damages for non-pecuniary damage and FRF 10,000 by way of reimbursement of legal costs under Article 475-1 of the Code of Criminal Procedure.
The Court of Appeal held as follows:

"This Court cannot agree with the manner in which the court below analysed the facts. The results of the investigations show that only a tax official familiar with the department could have leaked the documents, since no outside party had requested Jacques Calvet's file and that file was found, on the morning of 27 September 1989, in its normal condition, with the documents filed according to the particular practice of Chaillot Tax Office. It is certain that a third party, someone who was not a civil servant or was from outside the tax department, could not – without attracting attention – have taken documents filed in two separate places in the file, photographed or photocopied them and put them back in exactly the right place, given that the file is kept in a metal cabinet in a locked room to which there is access only for authorised persons.
Contrary to the court below, we therefore hold that, in this case, it has been established that the offence of breach of professional confidence was committed, and that the fact that the culprit has not been identified is irrelevant.
Mr Roire told the investigating judge that the photocopies of Jacques Calvet's tax notices were sent to him anonymously at the newspaper, in an envelope addressed to him personally. He confirmed that he had questioned various people in order to ensure that they were indeed copies of genuine tax documents.
Mr Roire's article, containing a reproduction of the documents in question, was submitted to Roger Fressoz, the publishing director of *Le Canard enchaîné*, who, personally, passed it for press.
Mr Fressoz told the investigating judge that he saw the extracts from Jacques Calvet's tax notices at that point. He explained that – as a general rule – copy is passed for press by the senior editorial assistant, who, if there is a problem, consults the editor and, in the last resort, himself.
The offence of handling the fruits of a breach of professional confidence was characterised, in the instant case, by the publication of documents obtained in breach of the provisions of Article L. 103 of the Code of Tax Procedure and Article 378 of the Criminal Code and was committed by Mr Roire and Mr Fressoz given that, in the light of the nature of the documents and of the checks which Mr Roire says he carried out, the defendants must have known that those documents came from a tax file. Moreover, this explains why the article was passed for press by Mr Fressoz, the publishing director, and not an editorial assistant or the editor. It is worth recalling that, although Mr Fressoz was not the person to whom the documents were sent, he saw them before giving his authorisation to publish the article reproducing extracts from them. Therefore, both the *actus reus* and the *mens rea* of the offence of handling the fruits of a breach of professional confidence are present in his case as well as in that of the author of the article, Mr Roire..."

4. In the Court of Cassation

16. Mr Fressoz and Mr Roire appealed to the Court of Cassation on points of law. In their

grounds of appeal (and subsequently in a reply to Mr Calvet's pleadings), they submitted two arguments.

As the first ground of appeal, Mr Fressoz argued that, since he was a publishing director as defined in the Act of 29 July 1881, the lower courts were not empowered to convict him of a handling offence under the general criminal law, but only of one of the offences specially defined in that Act. In his reply, he pointed out that the other side was confusing "handling" with "publishing", submitting that Mr Calvet was concerned, not by the handling but by the publication – something which did not contravene any provision of the press laws, so that the prosecution had resorted to another, inappropriate, charge, that of handling.

As the second ground, both applicants argued that the elements of the offence with which they had been charged, as defined in the relevant domestic law, including sections 5, 6 and 42 of the 1881 Act, were not made out in their case. On that point, they maintained that Mr Calvet's tax assessments were not covered by a duty to preserve confidentiality – so that there could have been no breach of such a duty – but contained information which was available to the public. They argued that a journalist could not lawfully be convicted of "handling information" and submitted that the Court of Appeal had failed to demonstrate how the *actus reus* and *mens rea* of the offence with which they had been charged – namely possession or control of the thing in question and knowledge that it had been obtained unlawfully – were made out in their case. With regard to the fact that the Court of Appeal had deduced that Mr Roire must have known that the documents had been obtained unlawfully since, when he had received them, he had verified that they were indeed copies of tax assessments, Mr Roire submitted that he had "merely fulfilled his duty as a journalist: before publishing information, he had checked that it was genuine, as required by the obligation on all journalists to exercise caution and verify sources".

17. The Court of Cassation dismissed the appeal on 3 April 1995, holding as follows:

> "...
> The grounds [of the Court of Appeal's judgment], following as they do from findings of fact which are not subject to review by this Court, show that the appellate court, having established that the defendants knowingly had in their possession or control documents obtained through a breach of professional confidence, contrary to Article L. 103 of the Code of Tax Procedure, did not misdirect themselves in law as alleged [by the appellants].
> In particular, the Court of Appeal cannot be held to have misinterpreted Article 460 of the Criminal Code as it stood at the time, in which the only offence defined is that of handling stolen goods, since, although it found the applicants guilty of handling unlawfully obtained photocopies, it rightly dismissed the charge of handling unlawfully obtained information on which the journalists were committed for trial before the Criminal Court. Information, whatever its nature or source, is covered neither by Article 460 nor by Article 321-1 of the Criminal Code which came into force on 1 March 1994, so that, if a problem arose – that is, if certain information were published and that publication were challenged by the persons concerned – the only legal provisions governing it would be those specifically concerning the freedom of the press or of audiovisual communication..."

II. Relevant Domestic Law

A. Freedom of the Press Act of 29 July 1881

18. The relevant sections of the Freedom of the Press Act of 29 July 1881 provide as follows:

> Section 1
> "Anyone may print or sell books and other publications".
> Section 5
> "Any newspaper or periodical may be published without prior authorisation or the payment of any security, provided that the declaration required by section 7 has been made".
> Section 6
> "All press publications must have a publishing director..."
> Section 42
> "The following persons shall be liable, as principals and in the following order, to penalties for serious crimes (*crimes*) or other major offences (*délits*) committed through the press:
> (1) publishing directors or publishers, whatever their profession or title and, in the circumstances defined in section 6(2), joint publishing directors;
> (2) in the absence of any of the foregoing, the actual offenders;
> ..."

B. The Code of Tax Procedure

19. The relevant Articles of the Code of Tax Procedure provide as follows:

> *Article L. 103* "The duty to preserve professional confidentiality, as defined in Article 378 of the Criminal Code, applies to any person who is required, in the course of his duties or exercise of his powers, to take any action concerning the assessment, inspection or recovery of, or disputes over, any taxes, duties, imposts or levies referred to in the General Tax Code. The duty shall cover all information obtained in the course of the above-mentioned operations."
> *Article L. 111-1* "A list of the persons liable for income tax or corporation tax shall be drawn up, distinguishing between the two types of tax as levied in each municipality.
> ...

The list shall be kept by the Revenue Department for each area and shall be available for consultation by the taxpayers in that area. The Department may order it to be posted.
...
The list concerning income tax shall also show, in the manner provided for by decree and for each taxpayer, the number of dependants' allowance tax units applicable, the amount of tax payable and the total tax credits.
...
Publishing or otherwise disseminating the lists referred to above or any information relating to those lists which concerns a named person is forbidden on pain of a tax fine under Article 1768 *ter* of the [General Tax] Code".

C. The Criminal Code

20. At the material time, Article 460 of the Criminal Code provided:

"Anyone who knowingly handles any goods (or any part thereof) taken, misappropriated or obtained by means of a serious crime (*crime*) or other major offence (*délit*) shall be liable to between three months' and five years' imprisonment or a fine of between FRF 10,000 and FRF 2,500,000 or both. The amount of the fine may be increased to a sum exceeding FRF 2,500,000 but not exceeding half the value of the goods handled..."

(..)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicants submitted that their conviction by the Paris Court of Appeal had infringed Article 10 of the Convention, which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Government contested that submission; the Commission agreed with it.

A. The Government's preliminary objection

26. As they had done before the Commission, the Government pleaded failure to exhaust domestic remedies. Mr Fressoz and Mr Roire had confined themselves to denying the charge of handling stolen goods that had been brought against them. At no stage, not even as an alternative submission, had they sought to argue that there was a contradiction between the charges on which they had been found guilty and the principle of freedom of expression. Thus, they had not complained, either expressly or in substance, of a breach of Article 10 of the Convention before the domestic courts even though they might have succeeded on that point of law, which had been admissible before the national courts. They had accordingly failed to afford the French courts an opportunity to decide whether the criminal proceedings that had been brought against them were compatible with the principle of freedom of expression. Consequently, domestic remedies had not been exhausted and the Court, consistent with its decision in the Ahmet Sadýk v. Greece case (see the judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1654, §§ 32-33), was unable to hear the case.

27. The applicants replied that they had raised in substance the complaint of a violation of Article 10 of the Convention before the Court of Cassation, as their pleadings before that court showed (see paragraph 23 above). After referring to the Act of 29 July 1881, which established the principle of freedom of the press, they had argued, firstly, that Mr Calvet's tax assessments were not confidential as they were available to the public and, secondly, that they could not in law be guilty of "handling information". In any event, arguing that there had been a breach of Article 10 would not have prevented the ordinary rules of law governing the handling of stolen goods taking precedence over the protection of freedom of expression.

28. In its decision on the admissibility of the application, the Commission dismissed the objection on the ground that the applicants had made a complaint before the Court of Cassation that was in substance connected with a breach of Article 10. The Delegate of the Commission in addition maintained before the Court that, as the Court of Cassation's powers had been limited (it could not have reopened the Court of Appeal's findings of fact), it was unlikely that redress for the alleged violation would have been obtained through an appeal on points of law. In his opinion, there would have been little point in the applicants' asserting their right to freedom of expression when dissemination of the information did not give rise to a risk of conviction under the general law.

29. Article 35 § 1, formerly Article 26, of the Convention reads as follows:

"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

30. The Court reiterates that the purpose of the rule referred to above is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. That rule must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the complaints intended to be made subsequently in Strasbourg should have been raised, "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law", before the national authorities (see the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 19, § 27, and the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, pp. 1210-11, §§ 65-69).

31. The applicants are engaged in the business of disseminating information and were convicted after publishing documents. In the Court of Cassation the applicants relied on various provisions of the Freedom of the Press Act of 29 July 1881, which, so far as the applicants' activities are concerned, contains provisions equivalent to those of Article 10. In their pleadings in support of their appeal to that court, the applicants argued that their article had not contravened any provision of the Freedom of the Press Act and that, as a journalist, Mr Roire had simply been doing his "duty" (see paragraph 23 above). In their pleading in reply, the applicants criticised the prosecution for confusing "handling" with "publication" saying that they had been charged with handling so that they could be prosecuted under the general law rather than under the special provisions governing the media (see paragraph 23 above). Indeed, by making a distinction in its judgment between the law applicable to the information itself and the law applicable to the document in which it was contained, the Court of Cassation indirectly ruled on the scope of journalists' rights to information.

32. In these circumstances, the Court holds that freedom of expression was in issue, if only implicitly, in the proceedings before the Court of Cassation and that the legal arguments made by the applicants' in that court included a complaint connected with Article 10 of the Convention.

The applicants' complaint under Article 10 of the Convention was thus raised, at least in substance, before the Court of Cassation. The Government's objection of failure to exhaust domestic remedies must therefore be dismissed.

B. The merits of the complaint

33. The applicants submitted that their conviction for handling photocopies of tax returns obtained through a breach of professional confidence by an unidentified tax official had infringed their right to freedom of expression.

34. The applicants' conviction was an "interference" with the exercise of their right to freedom of expression. Such interference breaches Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 and was "necessary in a democratic society" to attain such aim or aims.

1. "Prescribed by law"

35. Those appearing before the Court agreed that the interference was "prescribed by law", namely Article 460 of the former Criminal Code and Article L. 103 of the Code of Tax Procedure. The Court shares that view.

2. Legitimate aims

36. According to the applicants, the Government and the Commission, the interference was intended to protect the reputation or rights of others and to prevent the disclosure of information received in confidence. The Court sees no reason to conclude otherwise.

3. "Necessary in a democratic society"

37. The Court must therefore consider whether the interference was "necessary" in a democratic society in order to achieve those aims.

(a) General principles

38. The Court reiterates the fundamental principles under its case-law concerning Article 10.

(i) Freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that

offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, § 49, and the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 26, § 37).

(ii) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see the De Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, § 37). In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

(iii) As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases, such as the present one, concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see, *mutatis mutandis*, the Goodwin v. the United Kingdom judgment of 27 March 1996, *Reports* 1996-II, pp. 500-01, § 40, and the Worm v. Austria judgment of 29 August 1997, *Reports* 1997-V, p. 1551, § 47).

(iv) The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among many other authorities, the Goodwin judgment cited above, pp. 500-01, § 40).

(b) Application of the above principles to the present case

39. Mr Fressoz and Mr Roire said that their article had been published in the context of a public debate of general interest to which changes in Mr Calvet's earnings were, at the time, of particular relevance. The article was intended to contribute to a debate that went beyond the Peugeot chairman as an individual, since his importance, his role, the scale of the industrial dispute and the size of the company concerned were all matters lending themselves to discussion. The published article did not therefore concern Mr Calvet's reputation or rights, but the management of the company he ran.
The penalty imposed on them was all the more unjust in that, under the Court of Cassation's case-law, publishing details of a person's income or assets did not constitute an interference with his private life, especially if he exercised public or quasi-public functions.
Nor had the penalty been necessary to secure compliance with the duty to preserve confidentiality. In the instant case only the tax officials had been subject to confidentiality obligations. Other people, such as members of the works' council or of Mr Calvet's family, could have disclosed the information about his income. In any event, Mr Fressoz and Mr Roire could not have known that the photocopies of the tax assessments sent to them anonymously had been obtained through a breach of professional confidence, as the national courts themselves had been unable to establish such a breach, despite a two-year investigation.
By publishing part of the photocopied documents the applicants had been able to show that their information was true and fulfil their duty as journalists to communicate data that had been verified and proof.
Lastly, the reasoning of the Court of Appeal and the Court of Cassation was transparently artificial and its pernicious effects on freedom of the press immediate. Mr Calvet had complained solely because his income had been disclosed. The fact that the applicants had been convicted of the purely technical offence of handling photocopies disguised what was really a desire to penalise them for publishing the information, although publication in itself was quite lawful.

40. The Commission agreed in substance with those submissions.

41. The Government maintained that it was the breach of confidence regarding tax matters that

had led to the applicants' conviction and that conviction had been necessary to secure effective preservation of confidentiality. It would be unrealistic to hope to secure compliance with a duty to preserve confidentiality if any information, including information that was to remain confidential, could be disclosed with impunity. Restrictions on freedom of expression were to be assessed in the light of the responsibilities and obligations of those concerned when the information was obtained. The addressees of the letter must have been aware that the documents had been obtained unlawfully. Indeed, the second applicant had not disputed knowing that the documents came from a tax file and should therefore have treated them as confidential.
Furthermore, disclosing the remuneration of just one person, albeit the head of a major private company, did not contribute to the debate on a topic of interest to the public. The published information concerned a particular situation that was too specific to be a matter of public interest. It had been published solely with a view to damaging Mr Calvet and putting him in a difficult position in the pay negotiations that were under way.
French law made it possible for citizens to obtain information concerning the income and the tax liabilities of taxpayers in France. Thus under Article L. 111 of the Code of Tax Procedure (see paragraph 26 above) taxpayers in a municipality were entitled to consult a list of the people liable for tax and to find out those people's taxable income and tax liability.
In any event, there could not have been a disproportionate interference with freedom of expression as an alternative solution had been available that would have allowed any right the public had to information to be upheld, without the commission of a criminal offence. The applicants would not have been guilty of the offence of handling photocopies if they had confined themselves to publishing the information about Mr Calvet's income, without reproducing extracts from the photocopies of the tax assessments that had been sent to them by a person who was rightfully subject to professional confidentiality obligations. Admittedly, proceedings could have been brought against them for press libel. However, the case-law of the Court of Cassation established that journalists were entitled to adduce evidence justifying their assertions, even if obtained unlawfully. Subject to that condition, the applicants could have disclosed the information without restriction.

42. In the light of those arguments, the Court must examine whether relevant and sufficient reasons existed to justify the applicants' conviction for the purposes of paragraph 2 of Article 10.

43. The Court is unconvinced by the Government's argument that the information was not a matter of general interest. The article was published during an industrial dispute – widely reported in the press – at one of the major French car manufacturers. The workers were seeking a pay rise which the management were refusing. The article showed that the company chairman had received large pay increases during the period under consideration while at the same time opposing his employees' claims for a rise. By making such a comparison against that background, the article contributed to a public debate on a matter of general interest. It was not intended to damage Mr Calvet's reputation but to contribute to the more general debate on a topic that interested the public (see, for example, the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 28, § 66).
The Court of Cassation has held that questions relating to the finances of public figures, such as heads of major companies, do not concern their private life. That is not something the Government disputed.

44. Not only does the press have the task of imparting information and ideas on matters of public interest: the public also has a right to receive them (see, among other authorities, the following judgments: *Observer* and *Guardian* v. the United Kingdom of 26 November 1991, Series A no. 216, p. 30, § 59; Jersild, cited above, p. 23, § 31; and De Haes and Gijsels, cited above, p. 234, § 39). That is particularly true in the instant case, as issues concerning employment and pay generally attract considerable attention. Consequently, an interference with the exercise of press freedom cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest (see the Goodwin judgment cited above, p. 500, § 39).

45. Admittedly, people exercising freedom of expression, including journalists, undertake "duties and responsibilities" the scope of which depends on their situation and the technical means they use (see, *mutatis mutandis*, the Handyside judgment cited above, p. 23, § 49 *in fine*). In

the present case the Court of Appeal held that in the light of the nature of the documents and of the checks which Mr Roire says he carried out, the defendants must have known that the documents came from a tax file (see paragraph 22 above) and were therefore confidential. While recognising the vital role played by the press in a democratic society, the Court stresses that journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Indeed, paragraph 2 of Article 10 defines the boundaries of the exercise of freedom of expression. It falls to be decided whether, in the particular circumstances of the case, the interest in the public's being informed outweighed the "duties and responsibilities" the applicants had as a result of the suspect origin of the documents that were sent to them.

46. The Court must in particular determine whether the objective of protecting fiscal confidentiality, which in itself is legitimate, constituted a relevant and sufficient justification for the interference. In that connection, it must be noted that although the applicants' conviction was based solely on the reproduction in *Le Canard enchaîné* of documents in the possession of the tax authorities that were held to have been communicated to Mr Fressoz and Mr Roire in breach of professional confidence, it inevitably concerned the disclosure of information. The issue does however arise as to whether there was any need to prevent the disclosure of information that was already available to the public (see the Weber v. Switzerland judgment of 22 May 1990, Series A no. 177, p. 23, § 51, and the Vereniging Weekblad *Bluf!* v. the Netherlands judgment of 9 February 1995, Series A no. 306-A, p. 15, § 41) and might already have been known to a large number of people. As the Government accepted, a degree of transparency exists regarding earnings and pay rises. Thus local taxpayers may consult a list of the people liable for tax in their municipality, with details of each taxpayer's taxable income and tax liability (see paragraphs 26 and 48 above). While that information cannot be disseminated, it is thus accessible to a large number of people who may in turn pass it on to others. Although publication of the tax assessments in the present case was prohibited, the information they contained was not confidential. Indeed, the remuneration of people who, like Mr Calvet, run major companies is regularly published in financial reviews and the second applicant said, without it being disputed, that he had referred to information of that type in order to check roughly how much Mr Calvet was earning (see paragraph 19 above). Accordingly, there was no overriding requirement for the information to be protected as confidential.

47. If, as the Government accepted, the information about Mr Calvet's annual income was lawful and its disclosure permitted, the applicants' conviction merely for having published the documents in which that information was contained, namely the tax assessments, cannot be justified under Article 10. In essence, that Article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see, in particular, the Goodwin judgment cited above, p. 500, § 39; the Schwabe v. Austria judgment of 28 August 1992, Series A no. 242-B, p. 34, § 34; and, as an example of a finding to the contrary on the facts, the Prager and Oberschlick judgment cited above, p. 18, § 37).

48. In the instant case, the Court notes that neither Mr Fressoz and Mr Roire's account of the events nor their good faith has been called into question. Mr Roire, who verified the authenticity of the tax assessments, acted in accordance with the standards governing his profession as a journalist. The extracts from each document were intended to corroborate the terms of the article in question. The publication of the tax assessments was thus relevant not only to the subject matter but also to the credibility of the information supplied.

49. In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the journalists' conviction and the means deployed to achieve that aim, given the interest a democratic society has in ensuring and preserving freedom of the press. There has therefore been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

50. The applicants complained of two breaches of Article 6 § 2 of the Convention, which provides:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The national courts had failed to apply the presumption of innocence in two respects. Firstly, Mr Fressoz's conviction had resulted from an unwarranted extension to the special criminal-law system created by the Act of 29 July 1881 (see paragraph 25 above) that rendered publishing directors strictly liable for press offences. Secondly, the applicants should not have been convicted of an offence under the general law as there was no concrete evidence against them. In order to be able to convict, the Court of Appeal had had to resort to a purely hypothetical intellectual construction whereby the applicants were presumed to have known the fraudulent origin of the photocopies they had received.

51. The Government submitted that this complaint was incompatible *ratione materiae* with the provisions of the Convention. What the applicants were in fact seeking to do was to challenge the merits of their conviction by the Court of Appeal. However, it was not for the Convention institutions to determine whether the national courts had correctly assessed the evidence. In any event, there had been no presumption of guilt against the journalists in the Court of Appeal, which had given perfectly valid reasons for its decision.

52. Having heard the arguments made before it and in view of its conclusion that there had been a violation of Article 10 of the Convention, the Commission considered that the complaint under Article 6 § 2 arose out of the same facts and did not give rise to any issues of fact or law requiring separate examination.

53. The Court reaches the same conclusion and considers that, in the light of its finding in paragraph 56 and the matters it took into account in so finding, no separate issue arises under Article 6 § 2 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

(...)

FOR THESE REASONS, THE COURT unanimously
1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a breach of Article 10 of the Convention;
3. *Holds* that no separate issue arises under Article 6 § 2 of the Convention;
4. *Holds* that the respondent Government is to pay the applicants, within three months, 10,001 (ten thousand and one) French francs for pecuniary damage and 60,000 (sixty thousand) French francs for costs and expenses, together with simple interest at an annual rate of 3.36% payable from the expiry of the above-mentioned three months until settlement;
5. *Holds* that the present judgment constitutes in itself sufficient just satisfaction for any other damage;
6. *Dismisses* the remainder of the claim for just satisfaction.

ÖZGÜR GÜNDEM v. TURKEY, 16 MARCH 2000
APPLICATION NO. 23144/93

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. *Özgür Gündem* was a daily newspaper the main office of which was situated in İstanbul. It was a Turkish language publication with an estimated national circulation of up to 45,000 copies and a further unspecified international circulation. It incorporated its predecessor, the weekly publication *Yeni Ülke*, which was produced between 1990 and 1992. *Özgür Gündem* was published from 30 May 1992 until April 1994. It was succeeded by another newspaper, *Özgür Ülke*.

2. The case concerns the allegations of the applicants that *Özgür Gündem* was the subject of serious attacks and harassment which forced its eventual closure and for which the Turkish authorities are directly or indirectly responsible.

A. Incidents of violence and threats concerning *Ozgür Gündem* and persons associated with it

3. The applicants made detailed submissions to the Commission, listing the attacks made on journalists, distributors and others associated with the newspaper (see the Commission report,

§§ 32-34). The Government, in their submissions to the Commission, denied that some of these attacks occurred (see the Commission report §§ 43-62). In their submissions to the Court, neither party has made any comment on the Commission's findings in this respect (see §§ 141-142).

4. The following incidents are uncontested.
Seven persons connected with *Özgür Gündem* were killed in circumstances originally regarded as "unknown perpetrator" killings: (1) Yahya Orhan, a journalist shot dead on 31 July 1992; (2) Hüseyin Deniz, a member of staff of *Özgür Gündem*, shot dead on 8 August 1992; (3) Musa Anter, a regular columnist for *Özgür Gündem*, shot dead on 20 September 1992; (4) Hafýz Akdemir, a member of the staff of *Özgür Gündem*, shot dead on 8 June 1992; (5) Kemal Kýlýç, the Şanlýurfa representative of *Özgür Gündem*, shot dead on 18 February 1992 (an application no. 22492/93 introduced by Cemal Kýlýç concerning alleged State responsibility for this killing is pending before the Court, see the Commission's Report of 23.10.98); (6) Cengiz Altun, a reporter of *Yeni Ülke*, shot dead on 24 February 1992; (7) Ferhat Tepe, the Bitlis correspondent of *Özgür Gündem*, found dead on 4 August 1993 after his abduction on 28 July 1993.

The following attacks occurred:
(1) on 16 November 1992 an arson attack on the newsstand of Kadir Saka in Diyarbakýr; (2) an armed attack on Esref Yaşa, also a newsagent, on 15 January 1993, in Diyarbakýr; (3) an armed attack on the newsagent Haşim Yaşa on 15 June 1993 in Diyarbakýr (this incident and that concerning the attack on Eşref Yaşa were the subject of an application under the Convention, see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2411); on 26 September 1993, Mehmet Balamir, a newsboy, was attacked with a knife in Diyarbakýr as he was selling the newspaper; (4) in 1993, in Ergani, boys selling the newspaper were attacked by a person with a knife; (5) an arson attack on a newsagent in Mazidagý; (6) in Bingöl, on 17 November 1992, the car of a newsagent was destroyed by fire; (7) in Yüksekova, in October 1993, a bomb explosion damaged a newsagency; (8) a bomb exploded at the İstanbul office of the newspaper's successor *Özgür Ülke* on 2 December 1994, killing one employee and injuring eighteen others.

5. The applicants listed a large number of other incidents (arson attacks, attacks and threats on newsagents, distributors and newsboys) which the Government stated either did not occur or concerning which they stated that they had received no information or complaint (see Commission report, §§ 32-34 and 43-62). They also referred to the disappearance of the journalist Aysel Malkaç on 7 August 1993 and to the detention and ill-treatment of many journalists, one of whom, Salih Tekin, was found, upon his application to Strasbourg, to have been subject to inhuman and degrading treatment while in custody (see Commission report, § 37; the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1517-1518, §§ 53-54).

6. The applicants, and others acting on behalf of the newspaper and its employees, addressed numerous petitions to the authorities concerning the threats and attacks which they claimed had occurred. These are listed in the Commission report (§ 35) and include letters from the applicant Yaşar Kaya to the Governor of the State of Emergency Region, the Minister of the Interior, the Prime Minister and Deputy Prime Minister, informing them of the attacks and requesting investigations to be opened and measures of protection to be taken. No reply was made to the vast majority of these letters.

7. Written complaints were made by persons from the newspaper about specific attacks, incidents and threats concerning which the Government stated that they had received no information or complaint, including the attacks on child distributors in Diyarbakýr during 1993, the death of newsagent Zülküf Akkaya in Diyarbakýr on 27 September 1993 and attacks on distributors by persons with meat axes, also in Diyarbakýr, in September 1993 (see Commission report, § 35(s)). A written request for protective measures was made on 24 December 1992 to the Şanlýurfa Governor on behalf of the persons involved in the newspaper in Şanlýurfa, which was refused shortly before the journalist Kemal Kýlýç was shot dead on 18 February 1993 (see Commission report, § 35(l)).

8. Following a request for security measures received by the Diyarbakýr police on 2 December 1993, police escorted employees of the two companies dealing with the distribution of newspapers from the borders of Şanlýurfa province to the distribution stores. Measures were also taken with respect to deliveries of the newspaper from the stores to newsagents. The Government submitted to the Commission that no other requests for protection were received. Following the explosion at the *Özgür Ülke* office on 2 December 1994 and a request from the owner, security measures,

including patrolling, were taken by the authorities.

B. The search and arrest operation at the *Özgür Gündem* premises in Istanbul

9. On 10 December 1993, the police conducted a search at the *Özgür Gündem* office in Istanbul. During the operation, they took into custody those present in the building (107 persons, including the applicants Gurbetelli Ersöz and Fahri Ferda Çetin) and seized all the documents and archives.

10. Two search and seizure documents dated 10 December 1993 record that the police found two guns, ammunition, 2 sleeping bags and 25 gas masks. In a further search and seizure document dated 10 December 1993, it is stated that the following items had been found: photographs (described as kept in envelopes with a label "PKK Terrorist Organisation"), a tax receipt stamped with the name ERNK (a wing of the PKK organisation) for TRL 400,000,000, found in the desk of the applicant Yaşar Kaya, and numerous printed and handwritten documents, including an article on Abdullah Öcalan. A document dated 24 December 1993 signed by a public prosecutor at the Istanbul State Security Court listed the following material as having been seized: in a sealed envelope the military ID of Muzaffer Ulutaş killed in Şirnak in March 1993, in a sealed box 1,350 injections kits, 1 typewriter, 1 video cassette and audio cassette, and 40 books found at the house of the applicant Fahri Ferda Çetin. As a result of these mesures, the publication of the newspaper was disrupted for two days.

11. In an indictment dated 5 April 1994, charges were brought against the editor Gurbetelli Ersöz, Fahri Ferda Çetin, Yaşar Kaya, the manager Ali Rýza Halis and six others, alleging that they were members of the PKK and had rendered the PKK assistance and made propaganda in its favour. The Government have stated that Gurbetelli Ersöz and Ali Rýza Halis were convicted of aiding and abetting the PKK, by judgment of the Istanbul State Security Court no. 5 on 12 December 1996. Gurbetelli Ersöz had previously been convicted of involvement with the PKK in or about the end of December 1990 and had been released from prison in 1992.

C. Prosecutions concerning issues of *Özgür Gündem*

12. Numerous prosecutions were brought against the newspaper (including the relevant editor, the applicant Yaşar Kaya as the owner and publisher and the authors of the impugned articles), alleging that offences had been committed by the publication of various articles. The prosecutions resulted in many convictions, carrying sentences imposing fines and prison terms and orders of confiscation of issues of the newspaper and orders of closure of the newspaper for periods of three days to a month.

The prosecutions were brought under provisions rendering it an offence, *inter alia*, to publish material insulting or vilifying the Turkish nation, the Republic or other specific State officers or authorities, material provoking feelings of hatred and enmity on grounds of race, region or class, materials constituting separatist propaganda, disclosing the names of officials involved in fighting terrorism or publishing the declarations of terrorist organisations (see Relevant domestic law below).

13. On 3 July 1993, *Özgür Gündem* published a press release announcing that the newspaper was charged with offences which cumulatively were punishable by fines totalling TRL 8,617,441,000 and prison terms ranging between 155 years 9 months to 493 years and 4 months.

14. During one period of 68 days in 1993, 41 issues of the newspaper were ordered to be seized. In twenty cases, closure orders were issued, three for a period of one month, 15 for a period of 15 days and two for 10 days.

15. The applicants have further stated, uncontested by the Government, that there have been prosecutions in respect of 486 out of 580 editions of the newspaper and that, pursuant to convictions by the domestic courts, the applicant Yaşar Kaya has been fined up to TRL 35 billion, while journalists and editors together have had imposed sentences totalling 147 years' imprisonment and fines reaching the sum of TRL 21 billion.

(..)

II. RELEVANT DOMESTIC LAW

1. The Criminal Code (Law no. 765)

21. The relevant provisions of the Criminal Code read as follows:

Article 36 § 1 "In the event of conviction, the court shall order the seizure and confiscation of any object which

has been used for the commission or preparation of the crime or offence..."

Article 79 "A person who infringes various provisions of this Code by a single act, shall be punished under the provision which prescribes the heaviest punishment."

Article 159 § 1 "Whoever overtly insults or vilifies the Turkish nation, the Republic, the Grand National Assembly, or the moral personality of the Government, the Ministries or the military or security forces of the State or the moral personality of the judicial authorities shall be punished by imprisonment for one to six years."

Article 311 § 2 "Where incitement to commit an offence is done by means of mass communication, of whatever type – whether by tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled...".

Article 312 "A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one third to one half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2."

22. The conviction of a person pursuant to Article 312 § 2 entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations (Law no. 2908, section 4(2)(b)) or trade unions, nor may they be members of the executive committee of a trade union (Law no. 2929, section 5). They are also forbidden to found or join political parties (Law no. 2820, section 11(5)) and may not stand for election to parliament (Law no. 2839, section 11(f3)).

2. The Press Act (Law no. 5680 of 15 July 1950)

23. The relevant provision of the Press Act 1950 reads as follows:

Section 3

"For the purposes of the present Law, the term 'periodicals' shall mean newspapers, press agency dispatches and any other printed matter published at regular intervals.

'Publication' shall mean the exposure, display, distribution, emission, sale or offer for sale of printed matter on premises to which the public have access where anyone may see it.

An offence shall not be deemed to have been committed through the medium of the press unless publication has taken place, except where the material in itself is unlawful."

3. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)

24. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpetrated for the purposes of terrorism" (sections 3 and 4) and to which it applies. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 6

"It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's... identity is divulged, provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

...

Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[1]. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher."

Section 8

(before amendment by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

Where the crime of propaganda contemplated in the above paragraph is committed through the medium of

[1] The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and ceased to be in force on 27 July 1993.

periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*. However the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

Section 8

(as amended by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras..."

4. Law no. 4126 of 27 October 1995 amending sections 8 and 13 of Law no. 3713

25. The following amendments were made to the Prevention of Terrorism Act 1991 after the enactment of Law 4126 of 27 October 1995:

Temporary provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4[1] and 6[2] of Law no. 647 of 13 July 1965."

AS TO THE LAW

(..)

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

29. The applicants complain that the newspaper *Özgür Gündem* was forced to cease publication due to the campaign of attacks on journalists and others associated with the newspaper and due to the legal steps taken against the newspaper and its staff, invoking Article 10 of the Convention which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Concerning the allegations of attacks on the newspaper and persons associated with it

30. The applicants claimed that the Government of Turkey have, directly or indirectly, sought to hinder, prevent and render impossible the production of *Özgür Gündem* by the encouragement of or acquiesence in unlawful killings and forced disappearances, by harassment and intimidation of journalists and distributors, and by failure to provide any or any adequate protection for journalists and distributors when their lives were clearly in danger and despite requests for such protection.

The applicants relied on the findings in the Commission's report that there was a disturbing pattern of attacks on persons concerned with

[1] This provision concerns substitute penalties and measures which may be ordered in connection with offences attracting a prison sentence.

[2] This provision concerns reprieves.

Özgür Gündem and that the authorities, through their failure to take measures of protection and to conduct adequate investigations in relation to the apparent pattern of attacks on *Özgür Gündem* and persons connected with it, did not comply with their positive obligation to secure to the applicants their right to freedom of expression guaranteed under Article 10 of the Convention.

31. The Government emphasised that *Özgür Gündem* was the instrument of the terrorist organisation PKK and espoused the aim of that organisation to destroy the territorial integrity of Turkey by violent means. They disputed that any reliance could be placed on previous judgments of the Court or on the *Susurluk* report in deducing that there was any official complicity in any alleged attacks. In particular, the *Susurluk* report was not a judicial document and had no probative value.
The Government submitted that the Commission based its findings on general presumptions unsupported by any evidence and that the applicants had not substantiated their claims of a failure to protect the lives and physical integrity of persons attached to *Özgür Gündem*. Nor had they substantiated that the persons attacked were related to the newspaper. They disputed that any positive obligation extends to the protection and promotion of the propaganda instrument of a terrorist organisation but asserted that, in any event, necessary measures were taken in response to individual complaints, investigations being carried out by public prosecutors as required.

32. The Court observes that the Government have disputed the Commission's findings concerning the pattern of attacks in general terms without specifying which are, or in what way they are, inaccurate. It notes that the Government deny specifically that any weight can be given to the *Susurluk* report and its description of acquiescence and connivance by State authorities in unlawful activities, some of which targeted *Özgür Gündem* and journalists, of whom Musa Anter is specifically named.
In its judgment in the Yaşa case (the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2411, §§ 95-96), in which it was alleged that the security forces had connived in an attack on Esref Yaşa and his uncle who were both involved in the sale and distribution of *Özgür Gündem* in Diyarbakýr, the Court found that the *Susurluk* report did not provide a basis for enabling the perpetrators of the attack on Esref Yaşa and his uncle to be identified. It did find that the report gave rise to serious concerns and that it was not disputed in the Yaşa case that there had been a number of serious attacks on journalists, newspaper kiosks and distributors of *Özgür Gündem*. Furthermore, while the *Susurluk* report indeed may not be relied on for establishing to the required standard of proof that State officials were implicated in any particular incident, the Court considers that the report, which was drawn up at the request of the Prime Minister and which he decided should be made public, must be regarded as a serious attempt to provide information on and analyse problems associated with the fight against terrorism from a general perspective and to recommend preventive and investigative measures. On that basis, the report can be relied on as providing factual substantiation of the fears expressed by the applicants from 1992 onwards that the newspaper and persons associated with it were at risk of unlawful violence.

33. Having regard to the parties' submissions and the findings of the Commission in its report, the Court is satisfied that from 1992 to 1994 there were numerous incidents of violence, including killings, assaults and arson attacks, involving the newspaper and journalists, distributors and other persons associated with it. The concerns of the newspaper, and its fears that it was victim of a concerted campaign tolerated, if not approved, by State officials, were brought to the attention of the authorities (see paragraphs 14-15 above). It does not appear, however, that any measures were taken to investigate this allegation. Nor did the authorities respond by any protective measures, save in two instances (see paragraph 16 above).

34. The Court has long held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 (see, amongst others, the Gaskin v. the United Kingdom judgment of 7 July 1989, Series A no. 160, §§ 42-49) and Article 11 (the Plattform "Ärzte für das Leben" v. Austria judgment of 21 June 1988, Series A no. 139, § 32). Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 (e.g. the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, § 161) and Article 3 (the Assenov and Others v. Bulgaria judgment of 28 October 1998, *Reports* 1998-VIII, p. 3265, at § 102), while a positive obligation to take steps to protect life

may also exist under Article 2 (the Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, pp. 3159-3161, §§ 115-117).

35. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (*mutatis mutandis*, the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, § 23). In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is called for throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, amongst other authorities, the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, § 37, the Osman v. the United Kingdom judgment, cited above, § 116).

36. In the present case, the authorities were aware that *Özgür Gündem*, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent publication and distribution of the newspaper. No response however was given to almost all petitions and requests for protection submitted by the newspaper or its staff. The Government have only been able to identify one protective measure concerning the distribution of the newspaper which was taken while the newspaper was still in existence. The steps taken after the bomb attack at the İstanbul office in December 1994 concerned the newspaper's successor. The Court finds, having regard to the seriousness of the attacks and their widespread nature, that the Government cannot rely on the investigations lodged by individual public prosecutors into specific incidents. It is not persuaded by the Government's contention that these investigations provided adequate or effective responses to the applicants' allegations that the attacks were part of a concerted campaign which was supported, or tolerated, by the authorities.

37. The Court has noted the Government's submissions concerning its strongly-held conviction that *Özgür Gündem* and its staff supported the PKK and acted as its propaganda tool. This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence.

38. The Court concludes that the Government have failed, in the circumstances, to comply with their positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression.

B. Concerning the police operation at the *Özgür Gündem* premises in Istanbul on 10 December 1993

39. The applicants relied on the findings in the Commission's report that the search and arrest operation conducted on the premises of *Özgür Gündem* in Istanbul, during which all the employees were detained and the archives, library and administrative documents seized, disclosed an interference with the newspaper's freedom of expression for which there was no convincing justification. In their submissions to the Commission, they stated that there were innocent explanations for the allegedly incriminating material found on the premises (see the Commission's report, § 36(i)).

40. The Government pointed to the materials seized during the search, including injection kits, gas masks, an ERNK receipt and the identity card of a dead soldier, which, they submitted, were incontrovertible proof of the links between the newspaper and the PKK. They referred to the conviction on 12 December 1996 of the editor Gurbetelli Ersöz and manager Ali Rýza Halis for aiding the PKK. They also asserted that, of the 107 persons apprehended at the Istanbul office, 40 persons could claim no attachment to the newspaper, which gave additional grounds for suspicions of complicity with the terrorist organisation.

41. The Court finds that the operation, which resulted in newspaper production being disrupted for two days, constituted a serious interference with the applicants' freedom of expression. It accepts that the operation was conducted according to a procedure "prescribed by law" for the purpose of preventing crime and disorder within the meaning of the second paragraph of Article 10. It does not, however, find that a measure of such dimension was proportionate to this aim. No justification has been provided for the seizure

of the newspaper's archives, documentation and library. Nor has the Court received an explanation for the blanket apprehension of every person found on the newspaper's premises, including the cook, cleaner and heating engineer. The presence of 40 persons who were not employed by the newspaper is not, in itself, evidence of any sinister purpose or of the commission of any offence.

42. As stated in the Commission's report, the necessity for any restriction in the exercise of freedom of expression must be convincingly established (see, amongst other authorities, the Otto-Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A, § 50.) The Court concludes that the search operation, as conducted by the authorities, has not been shown to be necessary, in a democratic society, for the implementation of any legitimate aim.

C. Concerning the legal measures taken in respect of issues of the newspaper

1. The applicants

43. The applicants claimed that the Government also sought to hinder, prevent and render impossible the production and distribution of *Özgür Gündem* by means of unjustified legal proceedings. They adopt the findings in the Commission's report that many of the prosecutions brought against the newspaper in respect of the contents of articles and news reports were unjustified and disproportionate in their effects. They submit that the Commission analysed thoroughly a representative sample of prosecutions in the light of the principles established by the Court and found that most of the impugned articles contained no incitement to violence or comments likely to exacerbate the situation which could justify the measures imposed.

2. The Government

44. The Government submitted that the Commission was selective in the manner in which it examined domestic court decisions concerning *Özgür Gündem* publications. It was furthermore simplistic, in their view, to consider that only words directly and expressly inciting to violence might justifiably be prohibited, an approach which the Commission had taken in examining the articles. Implied, covert and veiled messages could equally have a negative impact. The Government argued that the correct test was to examine the actual danger caused by the publication. They also contended that the intention of the newspaper, namely, that of acting as a tool of propaganda for the PKK and of supporting its aim of endangering territorial integrity of Turkey, was crucial in this assessment. It is for the domestic authorities who are in contact with the vital forces of their countries to determine whether safety or security is threatened and the Contracting State must enjoy a wide margin of appreciation in any supervision carried out by Strasbourg.

3. The Commission

45. In its report, the Commission examined 21 court decisions concerning prosecutions in respect of 32 articles and news reports. These prosecutions related to various offences: insulting the State and the military authorities under Article 159 of the Criminal Code, provoking racial and regional hostility under Article 312 of the Criminal Code, reporting statements of the PKK under section 6 of the Prevention of Terrorism Act 1991, identifying officials appointed to fight terrorism under section 6 of the 1991 Act, and publishing separatist propaganda under section 8 of the 1991 Act. The prosecutions resulted in convictions involving prison terms, fines and closure of the newspaper. The Commission found that the criminal convictions and the imposition of sentences could be justified only in respect of three publications. Its summaries of the articles and court judgments are contained in its report (§§ 160-237).

4. The Court's assessment

46. The Court, firstly, sees no reason for criticising the approach adopted by the Commission which consisted in selecting domestic decisions for examination. The Commission reviewed the material and information provided by the parties, including the convictions and acquittals involved. Given the number of prosecutions and decisions, a detailed analysis of all cases would have been impracticable. The Commission identified decisions reflecting the different criminal offences at stake in the domestic cases. The articles examined varied in subject-matter and form and included news reports on different subjects, interviews, a book review and a cartoon. The Government have not provided any reason for holding that this selection was biased, unrepresentative or otherwise gave a distorted picture; nor did they identify any court decisions or articles which should have been examined instead.

47. The Court therefore accepts the approach taken by the Commission and will examine whether, in the cases which the latter included in

its report, the measures imposed disclose any violation of Article 10 of the Convention.

48. It finds, first, that *prima facie* these measures constituted an interference with the freedom of expression within the meaning of the first paragraph of Article 10 and fall to be justified in terms of the second paragraph. While the applicants submit, in their memorial, that the 1991 Prevention of Terrorism Act provisions (see paragraphs 32-33 above) are so vague and potentially all-inclusive as to violate the letter and spirit of Article 10, they have not provided any precise argument on why the measures in question should not be considered as "prescribed by law".
The Court recalls that it has already considered this point in previous judgments (see e.g. the Sürek v. Turkey (no. 1), judgment of 8 July 1999, to be published in the official reports of the Court, §§ 45-46, and twelve other freedom of expression cases concerning Turkey) and found that measures imposed pursuant to the 1991 Act could be regarded as "prescribed by law". The applicants have provided no basis on which to alter this conclusion. As in those other judgments, the Court therefore finds that the measures taken can be said to have pursued the legitimate aims of protecting national security and territorial integrity and of preventing crime and disorder (see e.g. Sürek v. Turkey (no. 1), cited above, § 52).

49. The Court shall now examine whether these measures were "necessary in a democratic society" for achieving such aim or aims in the light of the principles established in its case-law (see, amongst recent authorities, the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2533, § 51, the Sürek v. Turkey (no. 1) judgment, cited above, § 58). These may be summarised as follows:
(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it extends not only to "information" or "ideas" that are favourably received or regarded as inoffensive or indifferent, but also to those that offend, shock or disturb. Such are the demands of the pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly.
(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give a final ruling on whether a given "restriction" is reconcilable with the freedom of expression protected by Article 10.
(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether that interference was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

50. As these cases also concern measures against newspaper publications, they must equally be seen in the light of the essential role played by the press for ensuring the proper functioning of democracy (see, among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, § 41; and the above-mentioned Fressoz and Roire v. France judgment of 21 January 1999, to be published in the official reports of the Court, § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of the vital interests of the State, such as the protection of national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to convey information and ideas on political issues, even divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the above-mentioned Lingens judgment, p. 26, §§ 41-42).

(a) Prosecutions concerning the offence of insulting the State and the military authorities (Article 159 of the Criminal Code)

51. The Commission examined in this context three articles concerning the alleged destruction of houses in Lice by the security forces which led to the imposition of a prison sentence of ten months and a closure order of 15 days, and a cartoon depicting the Turkish Republic as a figure labelled *"kahpe*[1]*"*, which entailed the imposition of a fine, a 10-month prison term and a closure order of 15 days (see the Commission's report, §§ 161-166).

52. The Court recalls that the dominant position enjoyed by the State authorities makes it necessary for them to display restraint in resorting to criminal proceedings. The authorities of a democratic State must tolerate criticism, even if it may be regarded as provocative or insulting. The Court notes, in respect of the articles concerning the destruction in Lice, that allegations of security force involvement were circulating widely and indeed are the subject of proceedings in Strasbourg (see e.g. no. 23656/94, Ayder and others v. Turkey, Commission's report 21.10.1999, pending before the Court). The Commission also found that the terms of the article were factual in content and emotional, but not offensive, in tone. In respect of the cartoon, it notes that the domestic court rejected the claim that it was intended as a joke but found that it disclosed "the concentrated nature of the intention to insult". The Court does not find any convincing reason, however, for penalising any of these publications as described above. It agrees with the Commission's findings that the measures taken were not "necessary in a democratic society" for the pursuit of any legitimate aim.

(b) Prosecutions concerning the offence of provoking racial and regional hostility (Article 312 of the Criminal Code)

53. The case examined under this heading concerned an article describing alleged attacks by security forces on villages in the south-eastern region and attacks made by terrorists, including the killing of an *imam* (see the Commission's report, §§ 167-169). The domestic court, which imposed a fine and a prison sentence of 16 months' imprisonment on the author and issued a closure order of one month, referred to the manner in which the article was written, the reason why it was written and the social context, without offering any explanation. The Court notes that it did not rely on any alleged inaccuracy in the article. The Commission found that the article was factual and of public interest and that it contained no element of incitement to violence or overt support for the use of violence by the PKK. The Court does not find relevant and sufficient reasons for imposing criminal convictions and penalties in respect of this article and agrees with the Commission that the interference was not justified under Article 10 paragraph 2 of the Convention.

(c) Prosecutions for reporting statements of the PKK (section 6 of the 1991 Act)

54. The Commission reviewed seven court decisions concerning convictions which were imposed in respect of eight articles, and which involved fines and the confiscation of newspaper issues. The articles included reports of declarations of PKK organisations (e.g. ARGK), statements, a speech and an interview with Abdullah Öcalan, the PKK leader, a statement by the European representative of the PKK, an interview with Osman Öcalan, a PKK commander, a statement by the Dev-Sol European office, and an interview with Cemil Bayýk, a PKK commander (see the Commission's report, §§ 174-195).

55. The Court recalls that the fact that interviews or statements were given by a member of a proscribed organisation cannot in itself justify an interference with the newspaper's freedom of expression. Nor can the fact that the interviews or statements contain views strongly disparaging of Government policy. Regard must be had instead to the words used and the context in which they were published, with a view to determining whether the texts taken as a whole can be considered as inciting to violence (see e.g. the Sürek and Özdemir judgment of 8 July 1999, § 61).

56. The Court agrees with the Commission that four of the eight articles cannot be regarded as inciting to violence, in view of their content, tone and context. In particular, it finds that the statement of the Dev-Sol office in Europe, which recounts alleged police maltreatment of persons at a Turkish funeral in Germany, did not contain any material relevant to public order concerns in Turkey.

57. Three articles were found by the Commission to contain passages which advocated intensifying the armed struggle, glorified war and espoused

[1] This word conveys a range of meanings, including prostitute, tricky, deceitful.

the intention to fight to the last drop of blood. The Court agrees that, in the context of the conflict in the south-east, these could reasonably be regarded as encouraging the use of violence (see e.g. the Sürek v. Turkey (no. 1) judgment, §§ 61-62). Given also the relatively light penalties imposed, the Court finds that the measures complained of were reasonably proportionate to the legitimate aims of preventing crime and disorder and could be justified as necessary in a democratic society within the meaning of the second paragraph of Article 10.

(d) Prosecutions for identifying officials participating in the fight against terrorism (section 6 of the 1991 Act)

58. Five court decisions on six articles are concerned under this heading. Penalties imposed included fines, the confiscation of issues and, in one instance, a closure order of fifteen days (see the Commission's report, §§ 199-215).

59. The Court observes that the convictions and sentences had been imposed because the articles had identified by name certain officials in connection with alleged misconduct, namely, the death of the son of a DEP candidate during detention, the allegation of official acquiescence in the killing of Musa Anter, the forcible evacuation of villages, the intimidation of villagers, the bombing of Şirnak and the revenge killing of two persons after a PKK raid on a gendarme headquarters. However, it is significant that in two of the articles the officials named were not in fact alleged to be responsible for the misconduct but merely implicated in the surrounding events. In particular, concerning the death during detention, the Şýrnak security director was cited as having previously re-assured the family that the man would be released safely and the Şýrnak chief public prosecutor was reported as being unavailable for comment. While three village guards were named in the article concerning the revenge killing, it was alleged that the gendarmes had killed the two people.

60. It is true that the other three articles alleged serious misconduct by the officials named and were capable of exposing them to public contempt. However, as for the other articles, the truth of their content was apparently not a factor taken into account, and, if true, the matters described were of public interest. Nor was it taken into account that the names of the officials and their role in fighting terrorism were already in the public domain. Thus the State of Emergency Governor, who was named in one article, was a public figure in the region, while the gendarmerie commanders and village guards named in the other articles would have been well-known in their districts. The interest in protecting their identity was substantially diminished, therefore, and the potential damage which the restriction aimed at preventing was minimal. To the extent therefore that the authorities had relevant reasons to impose criminal sanctions, these could not be regarded as sufficient to justify the restrictions placed on the newspaper's freedom of expression (see e.g. the Sürek v. Turkey (no. 2) judgment of 8 July 1999, §§ 37-42). These measures accordingly could not be justified in terms of Article 10 § 2 of the Convention.

(e) Prosecutions for statements constituting separatist propaganda (section 8 of the 1991 Act)

61. Under this heading, the Commission identified six court decisions concerning twelve articles. The penalties imposed upon conviction included terms of imprisonment of 20 months and two years, fines, confiscation of issues and, in one instance, a closure order of one month (see the Commission's report, §§ 218-317).

62. The Court observes that the articles in question included reports on economic or social matters (e.g. a dam project, public health), commentaries on historical developments in the south-eastern region, a declaration condemning torture and massacres in Turkey and calling for a democratic solution, and accounts of alleged destruction of villages in the south-east. The Court notes that the use of the term "Kurdistan" in a context which implies that it should be, or is, separate from the territory of Turkey, and the claims by persons to exercise authority on behalf of that entity, may be highly provocative to the authorities. However, the public enjoys the right to be informed of different perspectives on the situation in south-east Turkey, irrespective of how unpalatable those perspectives appear to the authorities. The Court is not persuaded that, even against the background of serious disturbances in the region, expressions which appear to support the idea of a separate Kurdish entity must be regarded as inevitably exacerbating the situation. While several of the articles were highly critical of the authorities and attributed unlawful conduct to the security forces, sometimes in colourful and pejorative terms, the Court nonetheless finds that they cannot be reasonably regarded as advocating or inciting the use of violence. Having regard to the severity of the penalties imposed, it concludes that the restrictions imposed on the

newspaper's freedom of expression disclosed in these cases were disproportionate to the aim pursued and cannot be justified as "necessary in a democratic society".

D. Conclusion

63. The Court concludes that the respondent State has failed to take adequate protective and investigative measures to protect *Özgür Gündem*'s exercise of its freedom of expression and that it has imposed measures on the newspaper, through the search and arrest operation of 10 December 1993 and through numerous prosecutions and convictions in respect of issues of the newspaper, which were disproportionate and unjustified in the pursuit of any legitimate aim. As a result of these cumulative factors, the newspaper ceased publication. There has accordingly been a breach of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

64. The applicants claimed that the measures imposed on *Özgür Gündem* disclosed discrimination, invoking Article 14 of the Convention which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

65. The applicants asked the Court to reconsider the opinion, expressed in the Commission's report, that their complaints of discrimination were unsubstantiated. They submitted that the finding of a violation of Article 10 supports the conclusion that they suffered discrimination on the grounds of their national origin and association with a national minority. They argue that any expression of Kurdish identity was treated by the authorities as advocacy of separatism and PKK propaganda. In the absence of any justification for the restrictive measures imposed with regard to most of the articles examined by the Commission, these measures could only be explained by prohibited discrimination.

66. The Government submitted that the applicants' claims of discrimination were unsubstantiated.

67. The Court recalls that it has found a violation of Article 10 of the Convention. However, in reaching the conclusion that the measures imposed in respect of 29 articles and news reports were not necessary in a democratic society, it was satisfied that they pursued the legitimate aims of protecting national security and territorial integrity or that of the prevention of crime or disorder. There is no reason to believe that the restrictions on freedom of expression which resulted can be attributed to a difference of treatment based on the applicants' national origin or to association with a national minority. Accordingly, the Court concludes that there has been no breach of Article 14 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

(..)

FOR THESE REASONS THE COURT

1. *Decides* unanimously to strike the case out of the list insofar as it concerns Gurbetelli Ersöz;
2. *Holds* unanimously that there has been a violation of Article 10 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 14 of the Convention;
4. *Holds* by six votes to one
(a) that the respondent State pay, within three months;
(i) to the applicant company 9,000,000,000 (nine thousand million) Turkish liras; (ii) to Fahri Ferda Çetin and Yaşar Kaya for non-pecuniary damage 5,000 (five thousand) pounds sterling each to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment; (iii) to the applicants for costs and expenses 16,000 (sixteen thousand) pounds sterling less 9,195 (nine thousand, one hundred and ninety five) French francs to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment;
(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the abovementioned three months until settlement;
5. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ
(..)

PEDERSEN AND BAADSGAARD v. DENMARK, 17 DECEMBER 2004
APPLICATION NO. 49017/99 – GRAND CHAMBER

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The television programmes produced by the applicants

1. The applicants were two television journalists. At the relevant time they were employed by one of the two national TV stations in Denmark, *Danmarks Radio*. They produced two television programmes which were broadcast on 17 September 1990 at 8 p.m. and 22 April 1991 also at 8 p.m. It was estimated that approximately 30% of all viewers above the age of twelve years saw the programmes. The programmes, described as documentaries, were called "Convicted of Murder" (*dømt for mord*) and "The Blind Eye of the Police" (*Politiets blinde øje*) respectively and dealt with a murder trial in which on 12 November 1982 the High Court of Western Denmark (*Vestre Landsret*) had convicted a person, hereafter called X, of murdering his wife on 12 December 1981 between approximately 11.30 a.m. and 1 p.m. X was sentenced to 12 years' imprisonment. Upon appeal the Supreme Court (*Højesteret*) upheld the sentence in 1983. On 13 September 1990, subsequent to his release on probation, X requested the Special Court of Revision (*Den Særlige Klageret*) to reopen the case.
The applicants had commenced the preparation of the programmes in March 1989, which entailed establishing contact with witnesses through advertising in the local paper and via police reports.

At the outset of both programmes it was stated that they had been produced on the following premise:

> "In the programme we shall provide evidence by way of a series of specific examples that there was no legal basis for X's conviction and that by imposing its sentence, the High Court of Western Denmark set aside one of the fundamental tenets of the law in Denmark, namely that the accused should be given the benefit of the doubt.
> We shall show that a scandalously bad police investigation, in which the question of guilt had been prejudged right from the start, and which ignored significant witnesses and concentrated on dubious ones, led to X being sentenced to 12 years' imprisonment for the murder of his wife.
> The programme will show that X could not have committed the crime of which he was convicted on 12 November 1982".

1. The first programme "Convicted of Murder"

3. At an early stage in the first programme, "Convicted of Murder", the following comment was made:

> "In the case against X, police inquiries involved about 900 people. More than 4,000 pages of reports were written – and 30 witnesses appeared before the High Court of Western Denmark.
> We will try to establish what actually happened on the day of the murder, 12 December 1981. We shall critically review the police's investigations and evaluate the witnesses' statements regarding the time of X's wife's disappearance."

As part of the preparation of this first programme, the applicants had invited the police in the district of Frederikshavn, who had been responsible for the investigation of the murder case, to take part in the programme. Having corresponded on this subject for some time, the Chief of Police informed the applicants by letter of 19 April 1990 that the police could not participate in the programme as certain conditions for giving the interview had not been complied with, *inter alia* that the questions be sent in writing in advance,

4. Subsequent to the broadcast on 17 September 1990 of the first programme "Convicted of Murder", the applicants were charged with defamation in that in the programme they had unlawfully connected the boyfriend of X's wife ("the school teacher") to the death of two women referred to in the programme, one being X's wife. The defamation case ended on 14 December 1993 before the High Court with a settlement, according to which the applicants were to pay the school teacher 300,000 Danish kroner (DKK), apologise unreservedly, and give an undertaking never to broadcast the programme again.

2. The second programme "The Blind Eye of the Police"

5. The applicants alleged that the Chief Superintendent, at some unknown time before the broadcast of the second programme, during a telephone conversation with the applicant Pedersen, had declined to participate in the programme.

6. In the introduction to the second programme, "The Blind Eye of the Police", the following comment was made:

> "It was the police in the district of Frederikshavn who were responsible at that time for the investigations which led to the conviction of X. Did the police assume right from the start that X was the killer and did they therefore fail to investigate all the leads in the case, as otherwise required by the law?
> We have investigated whether there is substance in X's serious allegations against the police in the district of Frederikshavn."

7. Shortly afterwards in the programme the second applicant interviewed a taxi driver, who explained that she had been interviewed by two police officers a few days after the disappearance of X's wife, and that during this interview she had mentioned two observations she made on 12 December 1981: she had seen a Peugeot taxi (which was later shown to have no relevance to the murder), and before that she had seen X and his son at about 5-10 minutes past noon. She had driven behind them for about one kilometre. The reason why she could remember the date and time so exactly was because she had had to attend her grandmother's funeral on that date at 1 p.m.

8. The following comment was then made:

> Commentator: So in December 1981, shortly after X's wife disappears and X is in prison, the Frederikshavn Police is in possession of the taxi driver's statement in which she reports that shortly after 12 o'clock that Saturday she drives behind X and his son for about a kilometre...So X and his son were in Mølleparken [residential area] twice, and the police knew it in 1981.

9. The interview went on:

> "Second applicant: What did the police officers say about the information you provided?
> Taxi driver: Well, one of them said that it couldn't be true that X's son was in the car, but in fact I am 100% certain it was him because I also know the son because I have driven him to day-care.
> Second applicant: Why did he say that to you?
> Taxi driver: Well, he just said that it couldn't be true that the son was there.
> Second applicant: That it couldn't be true that you saw what you saw.
> Taxi driver: No, that is, he didn't say that I hadn't seen X, it just couldn't be true that the son was with him.
> Second applicant: These were the two police officers who questioned the taxi driver in 1981 and it was they who wrote the police report.
> We showed the taxi driver her statement from 1981, which she had never seen before.
> Taxi driver: It's missing, the bit about – there was only... about the Peugeot, there was nothing about the rest, unless you have another one.
> Second applicant: There is only this one.
> Taxi driver: But it obviously cannot have been important.
> Second applicant: What do you think about that?
> Taxi driver: Well it says, I don't know, well I think when you make a statement, it should be written down in any case, otherwise I can't see any point in it, and especially not in a murder case.
> Commentator: So the taxi driver claims that already in 1981 she had told two police officers that she had seen X and his son. Not a word of this is mentioned in this report.
> Second applicant: Why are you so sure that you told the police this, which at that time was 1981.
> Taxi driver:Well I am 100% sure of it and also, my husband sat beside me in the living room as a witness so..., so that is why I am 100% certain that I told them.
> Second applicant: And he was there throughout the entire interview?
> Taxi driver: Yes, he was.
> Second applicant: Not just part of the interview?
> Taxi driver: No, he was there all the time.
> Commentator: It was not until 1990, nine years later, that the taxi driver heard of the matter again, shortly after the "Convicted of Murder" programme had been shown; even though the taxi driver's report had been filed as a so called 0-report, she was phoned by a Chief Inspector of the Flying Squad (*Rejseholdet*) who had been asked by the Public Prosecutor to do a couple of further interviews.
> Taxi driver: The Chief Inspector of the Flying Squad called me and asked whether I knew if any of my colleagues knew anything they had not reported, or whether I had happened to think of something, and I then told him on the phone what I said the first time about the Peugeot and that I had driven behind X and his son up to Ryets Street, and then he said that if he found out about anything which, otherwise... or if there was anything, then he would... then he would get in touch with me again, which he didn't do, not until a while afterwards when he called me and asked whether I would come for another interview.
> Second applicant: When you told the Chief Inspector of the Flying Squad in your telephone call that you followed X, and his son was in the car, what did he say about that?
> Taxi driver: Well, he didn't say anything.
> Second applicant:He did not say that you had never reported this?
> Taxi driver: No, he didn't."

10. The second applicant then conducted a short interview with X's new counsel:

> "Second applicant: Have you any comment on the explanation the taxi driver has given now?
> X's new counsel: I have no comment to make at this time.
> Second applicant: Why not?
> X's new counsel: I have agreed with the public prosecutor, and the President of the Special Court of Revision, that statements to the press in this matter will in future only be issued by the Special Court of Revision.

Commentator: Even though X's new counsel does not wish to speak about the case, we know from other sources that it was he who, in February this year, asked for the taxi driver to be interviewed again. So in March she was interviewed at Frederikshavn police station in the presence of the Chief Superintendent, which is clearly at odds with what the public prosecutor previously stated in public, namely that the Frederikshavn police would not get the opportunity to be involved in the new inquiries."

11. The interview with the taxi driver continued:

"Second applicant: And what happened at the interview?
Taxi driver: What happened was that I was shown into the office of the Chief Inspector of the Flying Squad and the Chief Superintendent was there too.
Second applicant: Was there any explanation given about why he was present?
Taxi driver: No.
Second applicant: So what did you say in this interview?
Taxi driver: I gave the same explanations as I had done the first time when I was interviewed at home.
Second applicant: 10 years before, that is.
Taxi driver: Yes.
Second applicant: And that was?
Taxi driver: Well, that I had driven behind X and his son up to Ryets Street.
Second applicant: What did they say about that?
Taxi driver: They didn't say anything.
Second applicant: The report which was made in 1981, did you see it?
Taxi driver: No.
Second applicant: Was it there in the room?
Taxi driver: There was a report there when I was being interviewed, but I wasn't allowed to see it.
Second applicant: Did you expressly ask whether you could see the old report?
Taxi driver: I asked whether I could see it but the Chief Inspector of the Flying Squad said I couldn't..."

12. After the interview with the taxi driver the commentator said:

"Now we are left with all the questions: why did the vital part of the taxi driver's explanation disappear – and who in the police or public prosecutor's office should carry the responsibility for this?
Was it the two police officers who failed to write a report about it?
Hardly, sources in the police tell us they would not dare.
Was it [the named Chief Superintendent] who decided that the report should not be included in the case? Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury?..."

Pictures of the two police officers, the named Chief Superintendent and the Chief Inspector of the Flying Squad, were shown on the screen simultaneously and parallel with the above questions. The questions went on:

"Why did the Chief Inspector of the Flying Squad phone the taxi driver shortly after the TV-programme 'Convicted of Murder'? After all, the police had taken the view that the taxi driver had no importance as a witness and had filed her statement amongst the 0-reports.
Why did the Chief Inspector of the Flying Squad not call her in for an interview when she repeated her original explanation on the telephone?
Why was the taxi driver interviewed at the Frederikshavn police station in the presence of the Chief Superintendent, which was completely at odds with the public prosecutor's public statement?
On 20 September last year [a named] Chief Constable stated to [a regional daily]: 'all the information connected to the case has been submitted to the defendants, the prosecution and the judges' Did the Chief Constable know about the taxi driver's statement, when he made this statement? Did the State Prosecutor know already in 1981 that there was a statement from a witness confirming that X had been in Mølleparken twice, and that X's son had been with him both times? Neither of them have agreed to make any statement at all about the case."

13. In the meantime, on 11 March 1991, before the broadcast of the programme "The Blind Eye of the Police", at the request of X's new counsel, the taxi driver had again been interviewed by the police. She stated that on 12 December 1981 she had attended her grandmother's funeral at 1 p.m. and that on her way to the funeral around five or ten past noon she had driven behind X and his son. She had arrived at the funeral at the last minute before 1 p.m. She also explained that she had told the police about this when first interviewed in 1981. Later on 11 March 1991 the police made an enquiry which revealed that the funeral of the taxi driver's grandmother had indeed taken place on 12 December 1981, but at 2 p.m.
Thereafter, the police held three interviews with the taxi driver during which she changed her explanation, *inter alia,* as follows:
On 24 April 1991 she maintained having seen X shortly after noon but agreed that the funeral had taken place at 2 p.m. On her way to the funeral she realised she had forgotten a wreath. Thus, she had had to return to her home and had consequently arrived at the funeral just before 2 p.m.
On 25 April 1991 she stated that she was not sure about the date or the time when she had seen X and his son. Moreover, she was uncertain whether, shortly after the murder, she had told the police about having seen X. In addition, she explained that during the shooting of her interview, which had taken place on 4 April 1991, the applicant Baadsgaard had suggested that she say something like "where is the other report" when he was to show her the report of 1981.
On 27 April 1991 she initially stated that she had not seen X and his son on 12 December 1981. She had never before connected this episode to the funeral. She also admitted having made up the story about the forgotten wreath, but had wanted "things to fit". Later during the inter-

view she maintained that she had seen X and his son on 12 December 1981, but at around 1 p.m.

B. The criminal proceedings against the applicants

14. On 23 May 1991 the Chief Superintendent reported the applicants and the TV station to the police for defamation. It appears, however, that the prosecution's decision as to whether or not to charge the applicants was adjourned pending the decision whether to reopen X's case.

15. This was decided in the affirmative by the Special Court of Revision on 29 November 1991 after two hearings and the examination of ten witnesses, including the taxi driver. Two judges (out of five) in the Special Court of Revision found that new testimonial evidence had been produced on which X might have been acquitted, had it been available at the trial. Two other judges found that no new testimonial evidence had been produced on which X might have been acquitted, had it been available at the trial. The fifth judge agreed with the latter, but found that in other respects special circumstances existed which made it overwhelmingly likely that the available evidence had not been judged correctly. Accordingly, the court granted a retrial.

16. In the meantime, following the television programmes, an inquiry had commenced into the police investigation of X's case. The inquiry resulted in a report of 29 July 1991 by the Regional State Prosecutor, according to which the Police in Frederikshavn had not complied with section 751 (2) of the Administration of Justice Act (*Retsplejeloven*). This provision, introduced on 1 October 1978, provides that a witness must be given the opportunity to read through his or her statement. The non-compliance had not been limited to the investigation in X's case. Instead, allegedly in order to minimise errors or misunderstandings, the police in Frederikshavn usually interviewed witnesses in the presence of two police officers and made sure that crucial witnesses repeated their statements before a court as soon as possible. In this respect the Regional State Prosecutor noted that the High Court, before which X had been convicted in 1982, had not made any comments on the failure to comply with section 751 (2) of the Administration of Justice Act with regard to the witnesses who were heard before it in 1982. Finally, the Regional State Prosecutor noted that the police in the district of Frederikshavn were apparently not the only police district failing to comply with the said provision. The Regional State Prosecutor considered it unjustified to maintain that the taxi driver when interviewed in December 1981 had stated that she had seen X on the day of the murder. During the inquiry this had been contradicted by the two police officers who had interviewed the taxi driver in 1981. Moreover, the inquiry did not indicate that anybody within the Frederikshavn police had suppressed any evidence in X's case or in any other criminal case for that matter.
Consequently, on 20 December 1991, the Prosecutor General (*Rigsadvokaten*) stated in a letter to the Ministry of Justice that it was unfortunate and open to criticism that the police in Frederikshavn had not implemented the above provision as part of their usual routine and informed the Ministry that he had made an agreement with the State Police Academy that he would produce a wider set of guidelines concerning the questioning of witnesses, which could be integrated into the Police Academy's educational material.

17. X's retrial ended with his acquittal in a judgment of 13 April 1992 by the High Court of Western Denmark, sitting with a jury.

18. A lawyer who represented the applicants in another case had become aware of a letter of 18 May 1992 submitted by the Prosecutor General to the Legal Affairs Committee of the Danish Parliament (*Retsudvalget*) mentioning that subsequent to the broadcast of the programme "The Blind Eye of the Police" the applicants had been reported to the police by three police officers from Frederikshavn. By letter of 10 July 1992 the lawyer requested that the Prosecutor General state whether the applicants had been charged, and if so with what offence. By letter of 17 July 1992 he was told that no charge had been brought against the applicants.

19. On 19 January 1993 the Chief Constable in Gladsaxe informed the applicants that they were charged with defaming the Chief Superintendent. On 28 January 1993 the applicants were questioned by the police in Gladaxe.

1. Preliminary procedural questions

20. A request of 11 February 1993 by the prosecution to seize the applicants' research material was examined at a hearing in the Gladsaxe City Court (*Retten i Gladsaxe)* on 30 March 1993 during which the applicants' counsel, claiming that the case concerned a political offence, requested that a jury in the High Court - instead of the City Court - try the case. Both requests were refused by the Gladsaxe City Court on 28 May 1993. In June

1993 the prosecution appealed against the decision on seizure and the applicants appealed against the decision on venue. At the request of one of the applicants' counsel, an oral hearing was scheduled to take place in the High Court of Eastern Denmark (*Østre Landsret*) on 15 November 1993. However, on 7 October 1993 counsel challenged one of the judges in the High Court alleging disqualification and requested an oral hearing on the issue. The High Court decided on 15 October 1993 to refuse an oral hearing and on 11 November 1993 that the judge in question was not disqualified. It appears that counsel requested leave to appeal against this decision to the Supreme Court (*Højesteret*), but to no avail. As to the appeal against non-seizure and the question of venue, hearings were held in the High Court on 6 January and 7 March 1994, and by a decision of 21 March 1994 the High Court upheld the City Court's decisions. The applicants' request for leave to appeal to the Supreme Court was refused on 28 June 1994.

2. Proceedings before the City Court

21. On 5 July 1994 the prosecution submitted an indictment to the City Court. A preliminary hearing was held on 10 November 1994 during which it was agreed that the case would be tried over six days in midJune 1995. However, as counsel for one of the parties was ill, the final hearings were re-scheduled to take place on 21, 24, 28 and 30 August and 8 September 1995.

22. On 15 September 1995 the Gladsaxe City Court delivered a 68 page judgment, finding that the questions put in the TV programme concerning the named Chief Superintendent amounted to defamatory allegations, which should be declared null and void. However, the court did not impose any sentence on the applicants as it found that they had had reason to believe that the allegations were true. The court also ruled in favour of the applicants regarding a compensation claim raised by the widow of the named Chief Superintendent, who had died before the trial. The judgment was appealed against by the applicants immediately, and by the prosecution on 27 September 1995.

3. Proceedings before the High Court

23. On 15 April 1996 the prosecutor sent a notice of appeal to the High Court, and on 30 April 1996 he invited counsel for the applicants and the attorney for the widow of the Chief Superintendent to a meeting concerning the proceedings. Counsel for one of the parties stated that he was unable to attend before 17 June 1996, and accordingly the meeting was held on 25 June 1996. The High Court received the minutes of the meeting from which it appeared that counsel for one of the parties was unable to attend the trial before November 1996, and that he preferred the hearings to take place in early 1997. On 16 August 1996 the High Court scheduled the hearings for 24, 26 and 28 February and 3 and 4 March 1997.

24. On 6 March 1997 the High Court gave judgment convicting the applicants of violating the personal honour of the Chief Superintendent by making and spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, according to Article 267 § 1 of the Penal Code. The allegations were declared null and void. The applicants were each sentenced to 20 day-fines of DKK 400 (or 20 days' imprisonment in default) and ordered to pay compensation of DKK 75,000 to the estate of the deceased Chief Superintendent.

4. Proceedings before the Leave-to-Appeal Board

25. On 6, 16 and 25 March 1997 the applicants sought leave from the Leave-to-Appeal Board (*Procesbevillingsnævnet*) to appeal to the Supreme Court. Before deciding, the Board requested an opinion from the prosecuting authorities, namely the Chief of Police, the State Prosecutor and the Prosecutor General. On 27 June 1997 their joint opinion opposing leave to appeal was submitted. However, in the meantime it appears that a lawyer representing the TV station *Danmarks Radio* had contacted the State Prosecutor, proposing that the public prosecution assist in bringing the case before the Supreme Court as, according to the TV station, the High Court's judgment was incompatible with the Media Responsibility Act (*Medieansvarsloven*). Consequently, the public prosecutors initiated a new round of consultation on this question, and their joint opinion was forwarded to the Board on 3 September 1997. On 29 September 1997, having heard the applicants' counsel on the prosecution's submissions, the Board granted the applicants leave to appeal to the Supreme Court.

5. Proceedings before the Supreme Court

26. The Prosecutor General submitted a notice of appeal and the case file to the Supreme Court on 3 October and 6 November 1997 respectively.

27. As counsel wanted to engage yet another counsel, on 20 November 1997 they asked the Supreme Court whether costs in this respect would be considered legal costs. Moreover, they stated that their pleadings could not be submitted until early January 1998. On 17 March 1998 the Supreme Court decided on the question of costs, and on 19 March 1998 scheduled the trial for 12 and 13 October 1998.

28. By a judgment of 28 October 1998 the High Court's judgment was upheld, though the compensation payable to the estate was increased to DKK 100,000. The majority of five judges held:

"In the programme 'The Blind Eye of the Police' the applicants not only repeated a statement by the taxi driver that she had already explained to the police during their inquiries in 1981 that shortly after noon on 12 December 1981 she had driven behind X for about one kilometre, but also, in accordance with the common premise for the programmes 'Convicted of Murder' and 'The Blind Eye of the Police', took a stand on the truth of the taxi driver's statement and presented matters in such a way that viewers, even before the final sequence of questions, were given the impression that it was a fact that the taxi driver had given the explanation as she alleged she had done in 1981 and that the police were therefore in possession of this explanation in 1981. This impression was strengthened by the first of the concluding questions: '... why did the vital part of the taxi driver's explanation disappear and who, in the police or public prosecutor's office, should carry the responsibility for this?'. In connection with the scenes about the two police officers they pose two questions in the commentator's narrative, to which the indictment relates; irrespective of the kind of question, viewers undoubtedly received a clear impression that a report had been made about the taxi driver's statement that she had seen X at the relevant time on 12 December 1981; that this report had subsequently been suppressed; and that such suppression had been decided upon either by the named Chief Superintendent alone or by him and the Chief Inspector of the Flying Squad jointly. The subsequent questions in the commentator's narrative do not weaken this impression, and neither does the question of whether the Chief Constable or the public prosecutor were aware of the taxi driver's statement. On this basis we find that in the programme 'The Blind Eye of the Police' the applicants made allegations against the named Superintendent which were intended to discredit him in the eyes of his peers, as described in Article 267 § 1 of the Penal Code (*Straffeloven*). We find further that it must have been clear to the applicants that they were, by way of their presentation, making such allegations.

The applicants have not endeavoured to provide any justification but have claimed that there is no cause of action by virtue of Article 269 § 1 of the Penal Code – that a party who in good faith justifiably makes an allegation which is clearly in the general public interest or in the interest of other parties...

As laid down in the Thorgeirson v. Iceland judgment (25 June 1992), there is a very extensive right to public criticism of the police. As in that decision there is, however, a difference between passing on and making allegations, just as there is a difference between criticism being directed at the police as such and at individual named officers in the police force. Even though being in the public eye is a natural part of a police officer's duties, consideration should also be given to his good name and reputation.

As stated, the two applicants did not limit themselves in the programme to referring to the taxi driver's statement or to making value judgments on this basis about the quality of the police's investigations and the Chief Superintendent's leadership thereof. Nor did the applicants limit themselves to making allegations against the police as such for having suppressed the taxi driver's explanation; they made an allegation that the named Chief Superintendent had committed a criminal offence by suppressing a vital fact.

When the applicants were producing the programme they knew that an application had been made to the Special Court of Revision for the case against X to be reopened and that as part of the Court of Revision's proceedings in dealing with the said application the taxi driver had been interviewed by the police on 11 March 1991 at the request of X's defence as part of the proceedings to reopen the case. In consequence of the ongoing proceedings for reopening the case, the applicants could not count on the Chief Superintendent and the two police officers who had interviewed the taxi driver in 1981 being prepared to participate in the programme and hence possibly anticipate proceedings in the Court of Revision. Making the allegations cannot accordingly be justified by lack of police participation in the programme.

The applicants' intentions, in the programme, of undertaking a critical assessment of the police's investigation were proper as part of the role of the media in acting as a public watchdog, but this does not apply to every allegation. The applicants had no basis for making such a serious allegation against a named police officer and the applicants' opportunities for achieving the objects of the programme in no way required the questions upon which the charges are based to be included.

On this basis, and even though the exemptions provided in Article 10 § 2 of the Convention must be narrowly interpreted, and even though Article 10 protects not only the content of utterances but also the manner in which they are made, we concur that the allegation made was not caught by the exemption in Article 269 § 1 of the Penal Code. Indeed, as a result of the seriousness of the allegation, we concur that there is no basis for the punishment to be remitted in accordance with Article 269 § 2 of the Penal Code. We agree further that there are no grounds for the remittal of a penalty under Article 272.

We also concur with the findings on defamation.

We agree with the High Court that the fact that the allegation was made in a television programme on the national TV station *'Danmarks Radio'* and hence could be expected to get widespread publicity – as indeed it did – must be regarded as an aggravating factor for the purposes of Article 267 § 3. Considering that it is more than seven years since the programme was shown, we do not find, however, that there are sufficient grounds for increasing the sentence.

For the reasons given by the High Court we find that the applicants must pay damages to the heir of the Chief Superintendent. In this, it should be noted that it cannot be regarded as essential that the nature of the claim for

damages was not stated in the writ of 23 May 1991 since the Chief Superintendent's claim for financial compensation could not relate to anything other than damages. Due to the seriousness of the allegation and the manner of its presentation, we find that the compensation should be increased to DKK 100,000."

29. The minority of two judges who argued for the applicants' acquittal held, *inter alia*:

"We agree that the statements covered by the indictment, irrespective of their having been phrased as questions, have to be regarded as indictable under Article 267 § 1 of the Penal Code and that the applicants had the requisite intentions.

As stated by the majority, the question of culpability must be decided in accordance with Article 269 § 1, taken together with Article 267 § 1, interpreted in the light of Article 10 of the European Convention on Human Rights and the European Court of Human Right's restrictive interpretation of the exemptions under Article 10 § 2.

In reaching a decision, consideration must be given to the basis on which the applicants made their allegations, their formulation and the circumstances under which the allegations were made, as well as the applicants' intentions in the programme.

... We find that the applicants had cause to suppose that the taxi driver's statement that she had seen X on 12 December 1981 shortly past noon was true. We further find... that the applicants had reason to assume that the taxi driver, when interviewed in 1981, had told the two police officers that she had seen X...We accordingly attach weight to the fact that it is natural for such an observation to be reported to the police; that it is also apparent from her explanation in the police report of 11 March 1991 that she had already told the police about her observations in 1981; and that her explanation about the reaction of the police to her information that X's son had been in the car strengthened the likelihood of her having reported the observation at the interview in 1981.

... It is apparent from the TV programme that the applicants were aware that the Frederikshavn police had not at that time complied with the requirement to offer a person interviewed an opportunity to see the records of his or her statements. The applicants may accordingly have had some grounds for supposing that the December report did not contain the taxi driver's full statement or that there was another report thereon...

We consider that the applicants, in putting the questions covered by the indictment, did not exceed the limits of the freedom of expression which, in a case such as the present one, relating to serious matters of considerable public interest, should be available to the media. We also attach some weight to the fact that the programme was instrumental in the Court of Revision's decision to hear witnesses and we attach some weight to X's subsequent acquittal.

Overall, we accordingly find that [the allegation] is not punishable by virtue of Article 269 § 1 of the Penal Code...

[We agree that] the allegation should be declared null and void since its veracity has not been proved..."

II. RELEVANT DOMESTIC LAW

30. The relevant provisions of the Danish Penal Code applicable at the time read as follows:

Article 154

If a person in the exercise of a public office or function has been guilty of false accusation, an offence relating to evidence... or breach of trust, the penalty prescribed for the particular offence may be increased by not more than one-half.

Article 164 1. Any person who gives false evidence before a public authority with the intention that an innocent person shall thereby be charged with, convicted of, or subject to the legal consequence of, a punishable act shall be liable to mitigated detention (*hæfte*) or to imprisonment for a term not exceeding six years.

2. Similar punishment shall apply to any person who destroys, distorts or removes evidence or furnishes false evidence with the intention that any person shall thereby be charged with, or convicted of, a criminal act...

Article 267 1. Any person who violates the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens shall be liable to a fine or to mitigated detention.

2...

3. When imposing sentence it shall be considered an aggravating circumstance if the insult was made in printed documents or in any other way likely to give it wider circulation, or in such places or at such times as greatly to aggravate the offensive character of the act.

Article 268 If an allegation has been maliciously made or disseminated, or if the author has no reasonable ground to regard it as true, he shall be guilty of defamation and liable to mitigated detention or to imprisonment for a term not exceeding two years. If the allegation has not been made or disseminated publicly, the punishment may, in mitigating circumstances, be reduced to a fine.

Article 269 1. An allegation shall not be punishable if its truth has been established or if the author of the allegation has in good faith been under an obligation to speak or has acted in lawful protection of an obvious public interest or of the personal interest of himself or of others.

2. The punishment may be remitted where evidence is produced which justifies the grounds for regarding the allegations as true.

Article 272 The penalty prescribed in Article 267 of the Penal Code may be remitted if the act has been provoked by improper behaviour on the part of the injured person or if he is guilty of retaliation.

31. Section 751 of the Administration of Justice Act read as follows:

1. The relevant parts of the given testimonies must be included in the reports and particularly important parts of the testimonies should as far as possible be reported using the person's own words.

2. The person interviewed shall be given the opportunity to acquaint himself with the report. Any corrections or supplementary information shall be included in the report. The person interviewed shall be informed that he is not obliged to sign the report.

3. Audio recordings of the interview may only take place after informing the person interviewed.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

32. Complaining of the length of the criminal proceedings, the applicants relied on Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

"In the determination of... any criminal charge against him, everyone is entitled to a... hearing within a reasonable time by [a]... tribunal..."

(..)

(d) Conclusion

42. Making an overall assessment of the complexity of the case, the conduct of all concerned as well as the total length of the proceedings, the Court considers that the latter did not go beyond what may be considered reasonable in this particular case. Accordingly, there has been no violation of Article 6 § 1 of the Convention in respect of the length of the proceedings.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

43. The applicants submitted further that the judgment of the Danish Supreme Court amounted to a disproportionate interference with their right to freedom of expression guaranteed by Article 10 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Submissions of those appearing before the Court

1. The applicants

44. The applicants maintained that their questions in the programme "The Blind Eye of the Police" could not be seen as factual statements whose truthfulness they could be required to prove. Read as a whole and in their context, in the applicants' view, it was apparent that the questions merely implied a range of possibilities in the criticised handling of the investigation of the murder case from 1981-82, especially as regards the taxi driver's observations. The questions left it to the viewers to decide, between various logical explanations, who was responsible for the failures in the handling of the murder case. The questions did not assert that the Chief Superintendent had committed a violation of the Penal Code. However, he had been the head of the police unit that performed the muchcriticised investigation that led to the wrongful conviction of X. Accordingly, raising the hypothetical question whether he in his official capacity could be responsible for the misplacing or concealment of parts of the taxi driver's original statement was neither unreasonable nor excessive.

45. The applicants contended that the programmes were serious, wellresearched documentaries and that there could be no serious doubts about their good faith, including when relying on the taxi driver's account of the events. In their request for the case to be referred to the Grand Chamber and later at the hearing, the applicants submitted that the majority of the Chamber had seemed to question whether the taxi driver in 1981 had actually given the explanation to the police that she claimed to have done. The applicants regretted the Chamber's assessment and the method used in this respect with regard to review of facts in a case under the European Convention. In addition, although regretting that they had failed to verify the time of the funeral, the applicants contended that the taxi driver's explanation had appeared highly plausible and credible and she had had no reason not to tell the truth about what she had observed on 12 December 1981. In addition, her testimony had been a crucial element in the reopening of the case by the Special Court of Revision and the later acquittal of X. Moreover, the applicants had reason to believe that a significant statement, such as the one the taxi driver had allegedly given to the police, would be the subject of a police re-

port. Accordingly, and taking into consideration the fact that the Frederikshavn police had failed to comply with section 751 of the Administration of Justice Act at the material time, it seemed likely that someone within that police district had either misplaced or concealed part of the taxi driver's statement.

46. The applicants found that the majority of the Chamber had disregarded the Court's case law of according to which police officials must accept scrutiny by the public including the media on account of their sensitive functions. The applicants emphasised that, like politicians, civil servants were subject to wider limits of acceptable criticism than private individuals, and that members of the police force, including high-ranking police officers, could not be considered to have the same protection of their honour and reputation as afforded to judges. The applicants pointed out that the criticism was limited to the Chief Superintendent's performance as head of the investigation in the specific case and did not concern his general professional qualities or performance or his private activities. Furthermore, the applicants alleged that, during a telephone conversation between the first applicant and the Chief Superintendent, which had taken place at some unknown time before the broadcast of the second programme, the Chief Superintendent had declined to participate in the programme. Thus, he had not been precluded from participating in the programme.

2. The Government

47. The Government emphasised that the applicants had not been convicted for expressing strong criticism of the police, but exclusively for having, on their own behalf, made the very specific, unsubstantiated and extremely serious accusation against the named Chief Superintendent that he had intentionally suppressed evidence in the murder case. The Danish Supreme Court had fully recognised that the present case involved a conflict between the right to impart ideas and the right to freedom of expression and the protection of the reputation of others, and it had properly balanced the various interests involved in the case in conformity with the principles embodied in Article 10 of the Convention.

48. Moreover, the Government pointed out, the applicants had not been convicted for disseminating statements made by the taxi driver. In particular, she had made no allegation of suppression of evidence against the police in Frederikshavn, much less against the Chief Superintendent personally. In other words, the applicants had made an independent allegation to the extent that a vital piece of evidence had been suppressed and that such suppression had been decided upon either by the Chief Superintendent alone or by him and the Chief Inspector of the Flying Squad jointly. Leaving the viewers with these two options did not amount, as claimed by the applicants, to a range of possibilities. On the contrary, this was an allegation that the Chief Superintendent had in either event taken part in the suppression and thus committed a serious criminal offence, as also found by all three levels of jurisdiction, including the Supreme Court unanimously.

49. In the Government's view the applicants' allegation was of such a direct and specific nature that it clearly went beyond the scope of a value judgment. It had thus been fully legitimate to demand justification as a condition for nonpunishment. The applicants had the possibility of giving such justification, but had not done so. In this respect the Government referred both to the unanimous finding of the Supreme Court that the applicants had had no basis for making the allegations, and to its consequent ruling that the allegations were null and void.

50. The Government disputed the applicants' allegation that it was a fact that the taxi driver when questioned by the police in 1981 had claimed to have seen X on 12 December 1981. They observed that there was no authoritative finding of any Danish authorities or courts on this point. Also, setting aside the fact that the Government could not accept that there was any basis for jumping from the taxi driver's statement to the serious allegation against the Chief Superintendent, the Government submitted that the applicants had in any event failed to examine the validity of the taxi driver's statement, which had emerged over nine years after the events had taken place. The applicants had failed to check simple facts such as whether the funeral of the taxi driver's grandmother had actually taken place at 1 p.m. The Government found it sadly ironic that the programme, which by its own account aimed at clearing someone unjustly convicted in a court of law, had ended up unjustly convicting someone else in the court of public opinion. They pointed out that the applicants' first programme had also resulted in a defamation case.

51. The Government maintained that the Chief Superintendent had been precluded from participating in the programme "The Blind Eye of the Police" at the time when X's request for a re-opening of the murder trial was pending before the Special Court of Revision.

52. Finally, the Government submitted that the programme "The Blind Eye of the Police" had had no decisive influence on either the order to re-open the murder trial or on the subsequent judgment acquitting X.

B. Submissions by the Danish Union of Journalists

53. In their comments submitted under Article 36 § 2 of the Convention and Rule 61 § 3 of the Rules of Court, the intervening party, the Danish Union of Journalists (see paragraph 3 above) maintained that it was essential to the functioning of the press that restrictions on their freedom of expression be construed as narrowly as possible, with self-censorship being the most appropriate form of limitation.

54. Moreover, when imparting information as to the functioning of the police and the judiciary, notably when deficiencies therein resulted in miscarriages of justice, the press should have the right both to investigate and to present their findings with limited restrictions.

55. With regard to the present case, the Danish Union of Journalists contended that the applicants had researched the case very thoroughly. In this respect they had in fact been so successful that they had not merely raised a debate on a matter of serious public concern, they had also ultimately been able to change the course of justice.

56. Accordingly, in the view of the Danish Union of Journalists the Supreme Court judgment of 28 October 1998 amounted to an unjustified interference with the applicants' freedom of expression.

C. The Court's assessment

1. Whether there was an interference

57. It was common ground between the parties that the judgment of the Danish Supreme Court constituted an interference with the applicant's right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

2. Whether the interference was justified

58. An interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was necessary in a democratic society" in order to achieve those aims. It was not disputed that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of others, within the meaning of Article 10 § 2. The Court endorses this assessment. What is in dispute between the parties is whether the interference was "necessary in a democratic society."

(a) General principles

59. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).

60. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of the comments held against the applicants and the context in which they made them (see *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, § 52, ECHR 2000-I).

61. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken

was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2547-48, § 51).

(b) Application of the above principles in the instant case

62. The programmes "Convicted of Murder" and "The Blind Eye of the Police" were produced by the applicants on the premises "that there was no legal basis for X's conviction and that by imposing its sentence, the High Court of Western Denmark [on 12 November 1982] set aside one of the fundamental tenets of the law in Denmark, namely that the accused should be given the benefit of the doubt" and "that a scandalously bad police investigation, in which the question of guilt had been prejudged right from the start, and which ignored significant witnesses and concentrated on dubious ones, led to X being sentenced to 12 years' imprisonment for the murder of his wife" (see paragraph 11 above). The latter premise is also implied by the title of the second programme. Evidently, those topics were of serious public interest.
Freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 23, § 31; *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII). Moreover, a constant thread running through the Court's case-law is the insistence on the essential role of a free press in ensuring the proper functioning of a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to the administration of justice (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, § 37). Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38; *Thoma v. Luxembourg*, no. 38432/97, §§ 45 and 46, ECHR 2001-III; and *Perna* (cited above, § 39).
The Danish Supreme Court clearly acknowledged the weight to be attached to journalistic freedom in a democratic society when stating "that the applicants' intentions, in the programme, of undertaking a critical assessment of the police investigation were proper as part of the role of the media in acting as a public watchdog" (see paragraph 37 above).

63. However, the applicant journalists were not convicted for alerting the public to what they considered to be failings in the criminal investigation made by the police, or for criticising the conduct of the police or of named members of the police force including the Chief Superintendent, or for reporting the statements of the taxi driver, all of which were legitimate matters of public interest. Indeed, the Danish Supreme Court recognised that there is a very extensive right to public criticism of the police.
The applicants were convicted on a much narrower ground, namely for making a specific allegation against a named individual contrary to Article 267 § 1 of the Penal Code. This provision provides that "any person who violates the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens shall be liable to a fine or to mitigated detention" (see paragraph 39 above).

64. At all three levels of jurisdiction the Danish courts - the Gladsaxe City Court on 15 September 1995, the High Court of Eastern Denmark on 6 March 1997, and the Supreme Court unanimously on 28 October 1998 - found that the statements cited in the indictment, irre-

spective of their having been phrased as questions, had to be understood as containing factual allegations of the kind covered by Article 267 § 1 of the Penal Code and that the applicants had the requisite intentions. The courts at all three levels of domestic jurisdiction found unanimously that the applicants, by formulating the questions as they did, had made the serious accusation that the named Chief Superintendent had committed a criminal offence during the investigation against X, by intentionally suppressing a vital piece of evidence in the murder case, namely the taxi driver's explanation that she, at the time of the murder on 12 December 1981 shortly after noon, had seen X, with the result that X had been wrongly convicted by the High Court sitting with a jury on 12 November 1982.

65. The Court agrees with the domestic courts that the applicants, by introducing their sequence of questions with the question: "Why did the vital part of the taxi driver's explanation disappear - and who in the police or public prosecutor's office should carry the responsibility for this?" (see paragraph 21 above), took a stand on the truth of the taxi driver's statement and presented the matters in such a way that viewers were given the impression that it was a fact that the taxi driver had given the explanation as she claimed to have done in 1981; that the police were therefore in possession of this explanation in 1981; and that this report had subsequently been suppressed. The Court notes in particular that the applicants did not leave it open, or at least include an appropriate question, as to whether the taxi driver in 1981 had in fact given the explanation to the police that, nine years later, she claimed she had.

66. Subsequently they asked: "Was it the two police officers who failed to write a report about it? Hardly, sources in the police tell us, they would not dare. Was it [the named Chief Superintendent] who decided that the report should not be included in the case? Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury?" (see paragraph 21 above). The Court agrees with the Danish Supreme Court that the applicants thereby left the viewers with only two options, namely that the suppression of the vital part of the taxi driver's statement in 1981 had been decided upon either by the Chief Superintendent alone or by him and the Chief Inspector of the Flying Squad jointly. In either case it followed that the named Chief Superintendent had taken part in the suppression and thus committed a serious criminal offence. The applicants did not leave it open, or at least include the appropriate questions, as to whether a report had been made containing the alleged statement by the taxi driver, and if so, whether anyone had deliberately made it disappear.

67. In order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and valuejudgments, in that while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, for example, *Lingens v. Austria,* judgment of 8 July 1986, Series A no. 103, p. 28, § 46 and *Oberschlick v. Austria*, *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, p. 27, § 63). The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the ambit of the margin of appreciation of the national authorities, in particular the domestic courts (see *Prager and Oberschlick*, cited above, § 36). However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (*Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001II).

As regards the facts of the instant case, the Court notes, as did the Supreme Court, that the applicant journalists did not limit themselves to referring to the taxi driver's testimony and to making value judgments on this basis about the conduct of the police investigation and the Chief Superintendent's leadership of that investigation (see paragraph 37 above). The Court, like the Supreme Court, concludes that the accusation against the named Chief Superintendent, although made indirectly and by way of a series of questions, was an allegation of fact susceptible of proof. The applicants never endeavoured to provide any justification for their allegation, and its veracity has never been proven. It was for this reason that the courts at all three levels of jurisdiction in Denmark unanimously declared it null and void.

68. In news reporting based on interviews, a distinction also needs to be made as to whether the statement emanates from the journalist or is a quotation of others, since punishment of a journalist for assisting in the dissemination of statements made by another person in an interview

would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (see *Jersild*, cited above, § 35). Moreover, a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas (see, for example, *Thoma v. Luxembourg*, cited above, § 64).
In the present case the applicants were not convicted for reproducing or reporting the statements of others, as in *Jersild* (cited above). They were, as is undisputed, themselves the authors of the impugned questions and the allegations of facts found by the Supreme Court to be inherent in those questions. Indeed, in the programme "The Blind Eye of the Police" none of the persons appearing alleged that the named Chief Superintendent had intentionally suppressed a report which contained the taxi driver's statement that she had seen X on the day of the murder. The applicants drew their own conclusions from the statements of the witnesses, in particular the taxi driver, in the form of an accusation of deliberate interference with evidence, directed against the Chief Superintendent.

69. The Court observes in this respect that protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see e.g. the *Fressoz and Roire* judgment § 54; the Bladet Tromsø *and Stensaas* judgment, § 58, and the *Prager and Oberschlick* judgment, § 37, all cited above). Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. Moreover, these "duties and responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see, among other authorities, *McVicar v. the United Kingdom*, no. 46311/99, § 84, ECHR 2002-III and Bladet Tromsø cited above, § 66). Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proven guilty (see, among other authorities, *Worm v. Austria,* judgment of 29 August 1997, *Reports* 1997-V, § 50, and *Du Roy and Malaurie v. France*, no. 34000/96, § 34, ECHR 2000X).
During the domestic proceedings the applicants never endeavoured to prove their allegation, which was declared null and void. However, invoking Article 10 of the Convention and Article 269 § 1 of the Penal Code, the applicants claimed that, even if their questions amounted to an allegation, the latter could not be punishable because it had been disseminated in view of an obvious general public interest and in view of the interests of other parties.
The Court must therefore examine whether the applicants acted in good faith and complied with the ordinary journalistic obligation to verify a factual allegation. This obligation required that they should have relied on a sufficiently accurate and reliable factual basis which could be considered proportionate to the nature and degree of their allegation, given that the more serious the allegation, the more solid the factual basis has to be.

70. It is relevant to this assessment that the allegation was made at peak viewing time on a national TV station in a programme devoted to objectivity and pluralism; that it was therefore seen by a wide audience; and that the audio-visual media often have a much more immediate and powerful effect than the print media.

71. The Court must also take into consideration the fact that the accusation was very serious for the named Chief Superintendent and would have entailed criminal prosecution had it been true. The offence alleged was punishable with up to nine years' imprisonment under Articles 154 and 164 of the Penal Code (see paragraph 39 above). It is true that civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent politicians do (see *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1275, § 29; *Janowski*, cited above, § 33; and *Thoma*, cited above, § 47). Thus, although the Chief Superin-

tendent was subject to wider limits of acceptable criticism than private individuals, being a public official, a senior police officer and leader of the police team which had carried out an admittedly controversial criminal investigation, he could not be treated on an equal footing with politicians when it came to public discussion of his actions. Even less so, as the allegation exceeded the notion of "criticism of the Chief Superintendent's performance as head of the investigation in the specific case" (see paragraph 56 above) and amounted to an accusation that he had committed a serious criminal act. Thus, it inevitably not only prejudiced public confidence in him, but also disregarded his right to be presumed innocent until proven guilty according to law.

72. The police enquiries in the original criminal trial against X involved about 900 people and more than 4,000 pages of reports, and thirty witnesses gave statements before the High Court in 1982 (see paragraph 12 above). When preparing their programmes, the applicant journalists had established contact with various witnesses through advertising in the local paper and via police reports.

73. Yet, with regard to the accusation for which they were convicted, the applicants relied on one witness in particular, namely the taxi driver. The Court observes that during the programme "The Blind Eye of the Police" the taxi driver claimed that in 1981 she had told the two police officers who interviewed her about two observations she had made on the day of the murder: she had seen a Peugeot taxi and she had seen X and his son shortly after 12 o'clock on 12 December 1981. The reason why she could remember the exact date and time so well as to the latter observation was because she had had to attend her grandmother's funeral on that date at 1 p.m. (see paragraph 16 above).

74. The applicants' interview with the taxi driver was filmed on 4 April 1991. The applicants were at that time aware that the taxi driver, at the request of X's new counsel, had been interviewed by the police on 11 March 1991 and that during that interview she had maintained that she had told the police already in 1981 about having seen X shortly after noon on 12 December 1981 (see paragraphs 19-20 above). Despite the fact that this witness appeared over nine years after the events took place, the applicants did not check whether there was an objective basis for her timing of events. This could easily have been done, as shown by the police enquiry on 11 March 1991, which revealed that the funeral of the taxi driver's grandmother had taken place, not at 1 p.m., but at 2 p.m. on 12 December 1981 (see paragraph 22 above). This fact was indeed important, not only to the murder case, in which the crucial time was between 11.30 a.m. and 1 p.m., but also to the reliability of the taxi driver, who in calculation backwards from the time when the funeral took place, claimed to be completely accurate in her observations of the whereabouts of X. The Court also notes that the applicant journalists found their failure to verify the time of the funeral "regrettable".

75. In addition, the Court observes that the taxi driver at no point during the programme "The Blind Eye of the Police" asserted that the two police officers had definitely made a report containing her crucial statement; or that a report containing her crucial statement had been suppressed deliberately; or that it was the named Chief Superintendent who had intentionally suppressed the report. This being so, taking into account the nature and the seriousness of the applicant's allegation against the named Chief Superintendent, the applicants' reliance on the taxi driver's statement alone could not justify their three-fold speculation that the taxi driver had made her crucial statement to the police in 1981; that a report on it had been written; and that the Chief Superintendent had intentionally suppressed that report.

76. The applicants had obtained a copy of the report made by the two police officers in December 1981 mentioning the taxi driver's sighting on 12 December 1981 of a Peugeot taxi (which had no relevance to the murder) (see paragraph 18 above). The report itself did not contain any indication that something might have been deleted from it. Nor was there any evidence that another report had existed containing the taxi driver's statement that she had seen X on the relevant day.

77. When preparing the production of the programmes "Convicted of Murder" and "The Blind Eye of the Police", the applicants became aware that the police in Frederikshavn had not complied with section 751 (2) of the Administration of Justice Act, a provision which had been enacted on 1 October 1978 and provided that a witness should be given the opportunity to read his or her statement (see paragraph 39 above). The non-compliance was confirmed by the inquiry into the specific police investigation of X's case following the broadcast of the applicants' television

programmes (see paragraph 25 above). That inquiry resulted in a report of 29 July 1991 by the Regional State Prosecutor, stating *inter alia* that the police in Frederikshavn had not, in their usual routine, implemented the relevant provision. This noncompliance had not been limited to the investigation in X's case. Instead, allegedly in order to minimise errors or misunderstandings, the police in Frederikshavn usually interviewed witnesses in the presence of two police officers and made sure that crucial witnesses repeated their statements before a court as soon as possible. In that connection the Regional State Prosecutor noted that the High Court, before which X had been convicted in 1982, had not made any comments on the noncompliance with section 751 (2) of the Administration of Justice Act with regard to the thirty witnesses who were heard before it in 1982. Finally, the Regional State Prosecutor noted that the police district of Frederikshavn was apparently not the only police district which had failed to comply with the said provision. Consequently, on 20 December 1991 the Prosecutor General found the noncompliance unfortunate and open to criticism and he informed the Ministry of Justice that he would produce a wider set of guidelines to be integrated into the Police Academy's educational material.

78. Notwithstanding this finding of a procedural failure in the conduct of the investigation in X's case, neither the inquiry nor the statement by the Prosecutor General established that the taxi driver when interviewed in December 1981 had indeed also claimed to have seen X on the day of the murder (something that was in fact contradicted by the two police officers who had interviewed her in 1981, see paragraph 25 above); or that a report had been written containing such a statement; or that the existing police report of 1981 had not contained the taxi driver's full statement; or that somebody within the Frederikshavn police had suppressed evidence in X's case or any other criminal case for that matter.
Accordingly, in the Courts' view, the fact that the police in Frederikshavn had failed to comply with section 751 (2) of the Administration of Justice Act, whether taken alone or together with the taxi driver's statement, could not provide a sufficient factual basis for the applicants' accusation that the Chief Superintendent had actively tampered with evidence.

79. The applicant journalists submitted that their programmes and the taxi driver's testimony had been a crucial element in the Special Court of Revision's decision of 29 November 1991 to reopen X's trial and the High Court's judgment of 13 April 1992 acquitting X. It is, however, to be observed that counsel for X had already requested a re-opening of the trial on 13 September 1990, four days before the broadcast of the applicants' first programme "Convicted of Murder" and more than six months before the broadcast of programme "The Blind Eye of the Police" (see paragraph 10 above). The Court also notes that the Special Court of Revision was divided when the retrial was granted on 29 November 1991, in that only two judges out of five found that new testimonial evidence, including the taxi driver's statement, had been produced on which X might have been acquitted had it been available at the trial. The retrial was granted nevertheless because the presiding judge found that in other respects special circumstances existed which made it overwhelmingly likely that the available evidence had not been assessed correctly in 1982 (see paragraph 24 above). Finally, although X was acquitted by the High Court sitting with a jury on 13 April 1992, the judgment did not contain any specific reasoning with regard to the jury's answers to the particular questions put by the public prosecution (see paragraph 26 above). Thus, the assertion that the applicants' programmes or the taxi driver's testimony were a crucial element in the later acquittal of X amounts to speculation.

80. Even assuming that the applicants' programmes and the taxi driver's testimony were instrumental in the re-opening of the proceedings and the acquittal of X, the Court notes that none of those subsequent events, whether the re-opening decision or the re-trial, in any way supported the applicants' theory that led them to include their serious allegation against the Chief Superintendent in their programme "the Blind Eye of the Police" broadcast on 22 April 1991.

81. The Frederikshavn police were, it is true, invited to participate in the first programme "Convicted of Murder", which was broadcast on 17 September 1990, four days after X had requested that the Special Court of Revision order a new trial. This invitation was declined, however, since the applicant journalists were not willing to furnish beforehand and in writing the questions to be put to the police (see paragraph 12 above). On the other hand, the applicants have not substantiated their allegation that the named Chief Superintendent at some unknown time was invited to participate in the second programme "The Blind Eye of the Police", which was broadcast on 22 April 1991. In any event, noting espe-

cially the statement by X's new counsel made during the programme "The Blind Eye of the Police": "I have agreed with the public prosecutor and the President of the Special Court of Revision that statements to the press in this matter will in future only be issued by the Special Court of Revision" (see paragraph 19 above), the Court is satisfied that the named Chief Superintendent was in fact precluded from publicly commenting on the case while it was pending before the Special Court of Revision.

82. In assessing the necessity of the interference, it is also important to examine the way in which the relevant domestic authorities dealt with the case and in particular whether they applied standards which were in conformity with the principles embodied in Article 10 of the Convention (see paragraph 70 above). A perusal of the Supreme Court's judgment reveals that that court fully recognised that the present case involved a conflict between the right to impart information and protection of the reputation or rights of others, a conflict it resolved by weighing the relevant considerations in the light of the case-law under the Convention. Thus, the Supreme Court clearly recognised that the applicants' intention, in the programme, of undertaking a critical assessment of the police's investigation was a proper part of the role of the media in acting as a public watchdog. However, having balanced the relevant considerations, that court found no basis for the applicants to make such a serious charge against the named Chief Superintendent as they did, in particular because the applicants had sufficient other opportunities to achieve the objects of the programme.

83. On the basis of the various elements above and having regard to the nature and degree of the accusation, the Court sees no cause to depart from the Supreme Court's finding that the applicants lacked a sufficient factual basis for the allegation, made in the television programme broadcast on 22 April 1991, that the named Chief Superintendent had deliberately suppressed a vital piece of evidence in the murder case. The national authorities were thus entitled to consider that there was a "pressing social need" to take action under the applicable law in relation to that allegation.

84. The nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference under Article 10 of the Convention (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999IV; *Tammer v. Estonia*, no 41205/98, § 69, ECHR 2001-I; and *Lešník v. Slovakia,* no. 35640/97, § 63, ECHR 2003IV).
In the instant case the applicant journalists were each sentenced to 20 day-fines of DKK 400, amounting to DKK 8,000 (equivalent to approximately 1,078 euros (EUR)) and ordered to pay compensation to the estate of the deceased Chief Superintendent of DKK 100,000 (equivalent to approximately EUR 13,469) (see paragraphs 33 and 37 above). The Court does not find these penalties excessive in the circumstances or to be of such a kind as to have a "chilling effect" on the exercise of media freedom (see, *mutatis mutandis, Wille v. Liechtenstein* [GC], no. 28396/95, § 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II; and *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 714, 13 November 2003).

85. Having regard to the foregoing, the Court considers that the conviction of the applicants and the sentences imposed on them were not disproportionate to the legitimate aim pursued, and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants' exercise of their right to freedom of expression could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others.

86. There has accordingly been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 6 of the Convention;
2. *Holds* by 9 votes to 8 that there has been no violation of Article 10 of the Convention.

JOINT PARTIALLY DISSENTING OPINION OF JUDGES ROZAKIS, TÜRMEN, STRÁŽNICKÁ, BÎRSAN, CASADEVALL, ZUPANČIČ, MARUSTE AND HAJIYEV

(Translation)

1. We voted unanimously for the finding that there had been no violation of Article 6 of the Convention in the present case. On the other hand, we cannot follow the majority as regards their decision on Article 10 of the Convention, which in our opinion has been breached.

2. In this case the context of the application – in particular X's acquittal after nearly 10 years in prison following an alleged malfunctioning of the Danish judicial system, which was incontestably a serious question of general interest – supports our position. There is no need at this stage to refer to the principles governing freedom of expression and the fundamental role of the press in a democratic society, which have been reiterated by the Court throughout its case-law (see paragraph 71 of the judgment).

3. In a judgment of 28 October 1998 the Danish Supreme Court (by a majority) convicted the applicants under Article 267 § 1 of the Penal Code, for impugning the honour of a chief superintendent of police. The Supreme Court held (unanimously) that the statements covered by the indictment, despite being framed as questions, had to be regarded as indictable under Article 267 and that the applicants had the requisite intentions.
The applicants maintained that the questions posed by them in the programme "The Blind Eye of the Police", were to be read as a whole and in context. It would then be seen that the questions were not directed at defaming any particular person and did not contain any assertion that the Chief Superintendent had committed a violation of the Penal Code. In their submission, the questions merely implied a range of possibilities in the criticised police handling of the investigation of the murder case in 1981-82, especially as regards the taxi driver's observations and the identity of those responsible for concealing or misplacing her important witness statement.

4. We consider that the questions asked by the applicants after the interview with the taxi driver implied a range of possibilities in response to the criticisms concerning the investigation conducted by the police under the responsibility of the chief superintendent. The question why the taxi driver's statement was not included in the file and the identity of those responsible were matters left open for the television viewers to provide their own answers. A careful reading of the questions raised after the interview supports our view that:

(a) after the introductory explanations and before the journalists' questions the television viewers were duly warned that these were merely questions to which the applicants had no answer ("Now we are left with all the questions");

(b) the applicants raised broad-focus and logical questions intended to cover the various possible explanations why the witness's statement was not in the file and left open the possibility that the two police officers were responsible, although they added that, according to police sources, this was unlikely;

(c) they then referred to the possibility that the chief superintendent had decided not to include the witness evidence in the file, and expressed doubt as to whether he had correctly assessed the importance of the taxi driver's statement, but without accusing him of contravening the Penal Code;

(d) it was only after raising these questions that the applicants entered into details ("Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury?") and implicitly accused the two police officers, although, as we have pointed out, this was only one possibility among others which were evoked and left for the viewers alone to decide.

As the questions posed by the applicants after the interview were presented as possibilities, or indeed as value judgments or provocative hypotheses concerning factual information given out during the programme, we cannot agree with the majority that they amounted to an accusation that the chief superintendent had committed a criminal offence.

5. Even if the questions amounted to an allegation against the chief superintendent, the applicants, as investigative journalists reporting on an item of such high public interest, alerting the public to a possible malfunctioning of the justice system, could not have been expected to prove their assertions beyond a reasonable doubt.

Admittedly, the right of journalists to impart information on questions of general interest is protected only on condition that they express their views in good faith and on a correct factual basis. However, as paragraph 81 of the judgment makes clear, the police investigation and the criminal proceedings against X were complex and not without difficulties. The applicants had also conducted a large-scale search for witnesses when preparing their programmes. The taxi driver was one of those witnesses. During the programme "The Blind Eye of the Police" she declared:

(a) that in 1981 she had told the two police officers who interviewed her about two observations she had made on the day of the murder: she had seen a Peugeot taxi (which had no relevance to

the murder) and she had seen X and his son at about 12.05 or 12.10 p.m.;

(b) that she had driven behind them for about one kilometre;

(c) that she remembered the date and time so clearly because she had to attend her grandmother's funeral at 1 p.m. on that date;

(d) that she was 100% certain that she had told the police about the latter observation because her husband had sat beside her in the living room throughout the entire interview in 1981 (see paragraph 18 of the judgment).

6. The interview with the taxi driver was prepared on 4 April 1991. The applicants were at that time aware that she, at the request of X's new counsel, had been interviewed by the police on 11 March 1991 and that during that interview she had maintained that she had already told the police in 1981 that she had seen X shortly after noon on 12 December 1981. Furthermore, the applicants were in possession of a copy of the report produced by the Frederikshavn police on the taxi driver's statement of 1981. Since it did not contain any information about her alleged observation, the applicants confronted the taxi driver with the report during the programme. Nevertheless, the taxi driver upheld her statement that she had already told the police about this observation in 1981.

The Prosecutor General confirmed in a letter of 20 December 1991 to the Ministry of Justice that the Frederikshavn police at the relevant time had not complied with section 751(2) of the Administration of Justice Act, which provides that a witness must be given the opportunity to read his or her statement He found this non-compliance unfortunate and open to criticism (see paragraph 25 of the judgment). Before or during the production of their television programmes the applicants became aware of this non-compliance on the part of the Frederikshavn police. In our opinion, this was another element reinforcing their reliance on the taxi driver, when the latter claimed that something was missing from the police report shown to her during the second programme (see paragraph 18, previously mentioned).

7. Having regard to the foregoing, we consider that when the second programme was broadcast, on 22 April 1991, the applicants had a sufficient factual basis to believe the taxi driver's version of events and to believe that the report of December 1981 did not contain her full statement or that there was another report. The subsequent discovery that the funeral of the taxi driver's grandmother had actually taken place one hour later than the taxi driver had remembered did not detract from the fact that at the relevant time the applicants could reasonably assume that the funeral actually had taken place at 1.00 p.m. and that the taxi driver's statement could thus be considered of crucial importance. The reasonableness of their belief is not to be assessed with the benefit of hindsight.

8. In addition, some weight must be attached to the fact that the programme may have played a role in the Special Court of Revision's decision to grant a re-opening of the case, and the fact that X was ultimately acquitted (see paragraphs 24 and 26 of the judgment). The fact that a person who had been sentenced to twelve years' imprisonment for murder and spent almost ten years of his life behind bars was later acquitted on a retrial, serves at least to confirm the high degree of public interest involved in the TV programme in its endeavour to alert the public to a possible miscarriage of justice.

9. As the judgment makes clear, civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. We accept that a civil servant should not be "treated on an equal footing with politicians" (paragraph 80 of the judgment). However, their sensitive duties, which are frequently crucial for the liberty, security and well-being of society as a whole, place police officers at the centre of the social tension generated on the one hand by their exercise of State power and on the other by the right of the individual to be protected against the abuse of power on their part.

It seems obvious to us that a chief superintendent of police, as a senior civil servant and the head of the unit which had conducted the investigation which led to X's conviction, ultimately quashed, must necessarily accept, regard being had to his duties, powers and responsibilities, that his acts and omissions should be subjected to close and indeed rigorous scrutiny.

10. In short, we conclude that the justification put forward by the Danish authorities for the interference with the exercise by the applicant journalists of their right to the freedom of expression, albeit relevant, were not sufficient to show that that interference was "necessary in a democratic society".

TIMES NEWSPAPERS LTD (NOS. 1 AND 2) V. THE UNITED KINGDOM, 10 MARCH 2009 - APPLICATIONS NOS. 3002/02 AND 23676/03

THE FACTS

I. The circumstances of the case

5. The applicant, Times Newspaper Ltd, is the proprietor and publisher of *The Times* newspaper. The applicant is registered in England.

A. The two articles in The Times

6. On 8 September 1999 *The Times* published a report in the printed version of the newspaper headlined "Second Russian Link to Money Laundering". This report stated:

> "British and American investigators are examining the role of an alleged second Russian mafia boss over possible involvement in money-laundering through the Bank of New York.
> Investigators are understood to be looking at links to [G.L.: his name was set out in full in the original article], whose company, Nordex has been described by the CIA as an 'organisation associated with Russian criminal activity'.
> [G.L.]'s name surfaced in earlier money-laundering investigations which may have links to the Bank of New York affair, in which millions of dollars of Russian money are alleged to have been laundered.
> The Russian-born businessman came to the attention of European and American investigators in the early Nineties. They suspected Nordex of using its former international base in Vienna as a front for a large-scale money-laundering operation. His name also figured in a British police report in 1995, known as *Operation Ivan*, which looked at the extent of the influence of the Russian mob in London.
> [G.L.] has repeatedly denied any wrong-doing or links to criminal activity.
> Nordex, which has since moved out of Vienna, is also alleged to have been involved in the smuggling of nuclear weapons and by the mid-1990s reportedly controlled about 60 businesses in the former Soviet Union and another 40 companies in the West.
> *The Times* has learnt that these included between eight and ten off-shore companies in British jurisdictions, including the Channel Islands and the Isle of Man.
> They were administered through a chartered accountant in central London whose offices and home were raided in 1996 by officers from the City of London Police.
> The companies were suspected of being used to help launder money from Russia, which was then channelled through European banks. No charges were ever filed against the accountant.
> At about the same time a Yugoslav associate said to have been a frontman for [G.L.] was stopped and questioned after arriving at a London airport. No charges were filed against him.
> The British investigation into Nordex is believed to have failed because of the difficulty of establishing that the money funnelled through off-shore companies controlled by Nordex was linked to criminal activities.
> [G.L.] is alleged to be a former business associate of Viktor Chernomyrdin, the former Russian Prime Minister, and in 1995 his name hit the headlines after it emerged that he had been photographed with President Clinton at a Democrat fund-raising event in 1993.
> He is also alleged to have had business dealings with Semyon Mogilevich, the Hungarian-based mafia figure at the centre of the Bank of New York investigation."

7. On 14 October 1999 *The Times* published a second article entitled "Trader linked to mafia boss, wife claims". This report stated:

> "A Russian businessman under investigation by Swiss authorities pursuing allegations of money-laundering was a friend of [G.L.], a suspected mafia boss, the businessman's wife claims.
> Lev Chernoi, the aluminium magnate under Swiss investigation, was given access to staff and a chauffeur by [G.L.] when he moved to Israel, according to Lyudmila Chernoi, Mr Chernoi's estranged wife ...
> If Mrs Chernoi's allegation about a connection between her husband and [G.L.] is true, it will raise further questions about Mr Chernoi. In 1996 the CIA described Nordex, a company operated by [G.L.] and alleged to have been used to launder money and smuggle nuclear weapons, as an 'organisation associated with Russian criminal activity'.
> In 1996 [G.L.] triggered a row in America after a photograph was published of him with President Clinton in 1993. [G.L.] has denied any wrongdoing."

8. Both articles were uploaded onto the applicant's website on the same day as they were published in its newspaper.

B. The commencement of proceedings

9. On 6 December 1999 G.L. brought proceedings for libel in respect of the two articles printed in the newspaper against the applicant, its editor and the two journalists under whose by-lines the articles appeared, ("the first action"). The defendants did not dispute that the articles were potentially defamatory and did not seek to prove that the allegations were true. Instead, they relied solely on the defence of qualified privilege, contending that the allegations were of such a kind and such seriousness that they had a duty to publish the information and the public had a corresponding right to know.

10. While the first action was underway, the articles remained on the applicant's website, where they were accessible to Internet users as part of the applicant's archive of past issues. On 6 De-

cember 2000, G.L. brought a second action for libel in relation to the continuing Internet publication of the articles ("the second action"). Initially, the defendants' only defence to the second action was one of qualified privilege. The two actions were consolidated and set down for a split trial on issues of liability and then quantum.

11. On 23 December 2000, the applicant added the following preface to both articles in the Internet archive:

> "This article is subject to High Court libel litigation between [G.L.] and Times Newspapers. It should not be reproduced or relied on without reference to Times Newspapers Legal Department."

C. The Internet publications proceedings

12. In or around March 2001 the defendants applied to re-amend their defence in the second action in order "to contend that as a matter of law the only actionable publication of a newspaper article on the Internet is that which occurs when the article is first posted on the Internet" ("the single publication rule"). They argued that, as a result, the second action was time-barred by section 4A of the Limitation Act 1980.

13. On 19 March 2001 the High Court refused permission to re-amend the defence, relying in particular on the common law rule set out in *Duke of Brunswick v Harmer* (see paragraph 20 below) that each publication of a defamation gives rise to a separate cause of action. The court held that, in the context of the Internet, this meant that a new cause of action accrued every time the defamatory material was accessed ("the Internet publication rule").

14. On 20 March 2001 the High Court found that the defendants had no reasonable grounds for contending that after 21 February 2000 (the date on which the defendants lodged their defence in the first action) they remained under a duty to publish the articles on the Internet. As a result, the court struck out the defence of qualified privilege in relation to the second action. On 27 March 2001, judgment was entered for G.L. in the second action, with damages to be assessed. By this time the applicant had removed the articles from its website.

D. The Court of Appeal

15. The defendants appealed against the High Court's order of 19 March 2001 rejecting the single publication rule. They argued that the Internet publication rule breached Article 10, pointing out that as a result of the rule newspapers which maintained Internet archives were exposed to ceaseless liability for re-publication of the defamatory material. The defendants argued that this would inevitably have a chilling effect on the willingness of newspapers to provide Internet archives and would thus limit their freedom of expression.

16. In its judgment of 5 December 2001, the Court of Appeal, per Simon Brown LJ, dismissed the appeal against the order in the second action, stating:

> "We do not accept that the rule in the *Duke of Brunswick* imposes a restriction on the readiness to maintain and provide access to archives that amounts to a disproportionate restriction on freedom of expression. We accept that the maintenance of archives, whether in hard copy or on the Internet, has a social utility, but consider that the maintenance of archives is a comparatively insignificant aspect of freedom of expression. Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material. Nor do we believe that the law of defamation need inhibit the responsible maintenance of archives. Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material."

17. On 30 April 2002 the House of Lords refused leave to appeal. The parties subsequently settled the action and the applicant agreed to pay G.L. a sum of money in full and final settlement of claims and costs arising in both actions.

II. Relevant Domestic Law and Practice

A. The Limitation Act 1980

18. Section 2 of the Limitation Act 1980 ("the 1980 Act") sets out a general limitation period of six years in tort actions. Section 4A of the 1980 Act qualifies this limitation period as regards defamation actions and provides as follows:

> "The time limit under section 2 of this Act shall not apply to an action for–
> (a) libel or slander,
> (b) slander of title, slander of goods or other malicious falsehood,
> but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued."

19. Section 32A of the 1980 Act provides:

> "(1) It if appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which–
> (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.
(2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to–
(a) the length of, and the reasons for, the delay on the part of the plaintiff;
(b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A–
(i) the date on which any such facts did become known to him, and
(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
(c) the extent to which, having regard to the delay, relevant evidence is likely–
(i) to be unavailable, or
(ii) to be less cogent than if the action had been brought within the period mentioned in section 4A."

B. The Internet publication rule

20. *Duke of Brunswick v Harmer* [1849] 14 QB 154 lays down a common law rule of some significance. On 19 September 1830 an article was published in the *Weekly Dispatch*. The limitation period for libel was, at that time, six years. The article defamed the Duke of Brunswick. Seventeen years after its publication an agent of the Duke purchased a back number containing the article from the *Weekly Dispatch*'s office. Another copy was obtained from the British Museum. The Duke sued on those two publications. The defendant contended that the cause of action was time-barred, relying on the original publication date. The court held that the delivery of a copy of the newspaper to the plaintiff's agent constituted a separate publication in respect of which suit could be brought.

21. In *Godfrey v Demon Internet Limited* [2001] QB 201 the respondent brought an action in defamation against the appellants who were Internet service providers. They had received and stored on their news server an article, defamatory of the respondent, which had been posted by an unknown person using another service provider. The judge stated:

"In my judgment the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting. Thus every time one of the defendants' customers accesses 'soc culture thai' and sees that posting defamatory of the plaintiff there is a publication to that customer."

C. The defence of qualified privilege

22. The leading case on the defence of qualified privilege is *Reynolds v Times Newspapers* [2001] 2 AC 127. That case established that qualified privilege is an absolute defence to libel proceedings. In the leading judgment before the House of Lords, Lord Nicholls of Birkenhead explained the defence as follows:

"The underlying principle is conventionally stated in words to the effect that there must exist between the maker of the statement and the recipient some duty or interest in the making of the communication. Lord Atkinson's dictum, in Adam v. Ward [1917] A.C. 309, 334, is much quoted:
'a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential'.".

D. Press Complaints Commission Code of Conduct

23. The Press Complaints Commission has adopted a code of conduct which is regularly reviewed and amended as required. Paragraph 1 of the current Code of Conduct reads as follows:

"**1. Accuracy**

i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.
ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published.
iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.
iv) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published."

E. The US single publication rule

24. Unlike the United Kingdom court, the courts of the United States of America have chosen to apply the "single publication rule". In the case of *Gregoire v GP Putnam's Sons* (1948) 81 N.E.2d 45 a book originally put on sale in 1941 was still being sold in 1946 following several reprints. The New York Court of Appeals considered the rule in *Duke of Brunswick v Harmer*, but concluded that it was formulated "in an era which long antedated the modern process of mass publication" and was therefore not suited to modern conditions. Instead, the court held that the limitation period started to run in 1941, when the book was first put on sale. The court pointed out that

"Under [the rule in *Duke of Brunswick v Harmer*] the Statute of Limitation would never expire so long as a copy of such book remained in stock and is made by the publisher the subject of a sale or inspection by the public. Such a rule would thwart the purpose of the legislature."

25. The single publication rule was subsequently applied to a website publication in *Firth v State of New York* (2002) NY int 88. In that case, a report published at a press conference on 16 December 1996 was placed on the internet the same day. A claim was filed over a year later. The New York Court of Appeals held that the limitation period started when the report was first uploaded onto the website and did not begin anew each time the website version of the report was accessed by a user. The court observed that:

"The policies impelling the original adoption of the single publication rule support its application to the posting of ... the report ... on the website ... These policies are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet ... Thus a multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet which is, of course, its greatest beneficial promise."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complains that the Internet publication rule constitutes an unjustifiable and disproportionate restriction of its right to freedom of expression as provided in Article 10 of the Convention, which reads, insofar as relevant, as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ..."

A. Admissibility

27. The Court has consistently emphasised that Article 10 guarantees not only the right to impart information but also the right of the public to receive it (see Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59(b), Series A no. 216; *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998I). In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally. The maintenance of Internet archives is a critical aspect of this role and the Court therefore considers that such archives fall within the ambit of the protection afforded by Article 10.

28. The Court concludes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The merits

1. The parties' observations

a. The applicant

29. The applicant contended that the Internet publication rule restricted its ability to maintain a publicly accessible Internet archive. It pointed to the "chilling effect" that the rule had upon freedom of expression, which it said was aggravated by the fact that it had not actively sought to disseminate the information contained in its Internet archive. The applicant submitted that Article 10 required the adoption of a single publication rule.

30. The applicant contested the finding of the Court of Appeal that the maintenance of archives constituted an insignificant aspect of freedom of expression. The applicant pointed to the importance of the integrity and availability of historical records to an open and democratic society.

31. The applicant argued that since the defence of qualified privilege was a complete defence to the libel claim, it was under no obligation to publish a qualification in respect of the relevant articles until the litigation had been resolved. It pointed out that the Code of Practice of the Press Complaints Commission obliged newspapers to post a notice or qualification where a publication had been the subject of a judgment or settlement in favour of the complainant. Any other approach would require a large number of articles to be qualified. Attempts to limit qualification to

those articles which were potentially libellous would be difficult: because the libellous nature of a publication may change over time, the applicant would be required to keep the entirety of its Internet archive under review. The applicant pointed out that approximately 500 items were uploaded onto its Internet archive every day.

32. The applicant argued that it was open to the Court to consider the general principle which arose, notwithstanding the specific facts of the case. Although the applicant accepted that G.L.'s rights were also engaged, it considered that a single publication rule would not constitute an excessive restriction on the right of effective access to the court.

b. The Government

33. The Government relied on the conclusions in the domestic proceedings that the journalists had not demonstrated the requisite standard of responsibility in respect of the two articles. They further relied on the fact that no qualification was added to the articles on the applicant's website until 23 December 2000, over 12 months after the original libel proceedings were initiated.

34. Although the Government accepted that maintaining archives had a social utility, they considered that this was not an aspect of the exercise of freedom of expression which was of central or weighty importance, archive material being "stale news". In the present case, the Government argued that there was no evidence that the applicant had been prevented or deterred from maintaining its online archive. Furthermore, the steps required of the applicant to remove the sting from its archive material were not onerous.

35. As regards the applicant's claim of ceaseless liability, the Government observed that no question of ceaseless liability arose in the present case. The Government pointed out that the second action was contemporaneous with the first action and did not raise stale allegations many years after the event. In any case, even under a single publication rule, (1) the continued publication of articles which the applicant knew to be defamatory, which were not qualified in any way and which were not defended as true would constitute a separate actionable tort under English law; and (2) if accompanied by a statutory discretion along the lines of section 32A of the 1980 Act, the court may well have exercised that discretion to allow G.L. to bring the second action, having regard to the circumstances.

36. The Government highlighted that the present case also engaged the Article 8 and Article 6 rights of G.L. In the choice between the single publication rule and the Internet publication rule, these competing interests should be balanced. They pointed to the fact that there was no consistency of approach to this issue in other jurisdictions and concluded that, on the facts of this case, the application of the Internet publication rule was a permissible and proportionate restriction on the applicant's right to freedom of expression and did not violate Article 10.

2. The Court's assessment

37. The Court notes that judgment was entered against the applicants in the second action. Furthermore, the applicant subsequently agreed to pay a sum of money in settlement of G.L.'s claims and costs in both actions. The Court therefore considers that the second action constituted an interference with the applicant's right to freedom of expression. Such interference breaches Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in Article 10 § 2 and was "necessary in a democratic society" to attain such aim or aims.

a. "Prescribed by law"

38. The applicant does not contest the lawfulness of the interference, which derived from the application of the rule set out in *Duke of Brunswick v Harmer* as developed in the case of *Godfrey v Demon Internet Limited*. The Court sees no reason to hold that the interference was not lawful and therefore concludes that the interference with the applicant's right freedom of expression was "prescribed by law" within the meaning of Article 10 § 2.

b. Legitimate aim

39. The Internet publication rule is aimed at protecting the rights and reputation of others. It has not been disputed, and the Court also agrees, that the interference has a legitimate aim.

c. "Necessary in a democratic society"

i. General principles

40. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and in that context the safeguards guaranteed to the press are particularly important. Whilst the press must not overstep the boundaries set, *inter alia*, in the interest of

"the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas but the public also has a right to receive them. In this way, the press fulfils its vital role as a "public watchdog" (Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216).

41. The Court observes that the most careful of scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern (Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999III). The Court further recalls that particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive (see *Timpul Info-Magazin and Anghel v. Moldova*, no. 42864/05, § 31, 27 November 2007).

42. However, the Court reiterates that Article 10 does not guarantee a wholly unrestricted freedom of expression to the press, even with respect to press coverage of matters of serious public concern. When exercising its right to freedom of expression, the press must act in a manner consistent with its duties and responsibilities, as required by Article 10 § 2. These duties and responsibilities assume particular significance when, as in the present case, information imparted by the press is likely to have a serious impact on the reputation and rights of private individuals. Furthermore, the protection afforded by Article 10 to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with responsible journalism (*Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999I and Bladet Tromsø *and Stensaas*, cited above, § 65).

43. Finally, it should be recalled that in assessing whether the interference was justified, it is not the role of the Court to substitute its views for those of the national authorities but to review the case as a whole, in the light of Article 10, and consider whether the decision taken by national authorities fell within the margin of appreciation allowed to the member States in this area (*Handyside v. the United Kingdom*, 7 December 1976, § 50, Series A no. 24).

ii. Application of the principles to the present case

44. The applicants maintain that they are exposed to litigation, without limit in time, on account of the adoption of the Internet publication rule instead of the single publication rule.

45. The Court agrees at the outset with the applicant's submissions as to the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. The Court therefore considers that, while the primary function of the press in a democracy is to act as a "public watchdog", it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported. However, the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned. In particular, the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.

46. The Court further observes that the introduction of limitation periods for libel actions is intended to ensure that those who are defamed move quickly to protect their reputations in order that newspapers sued for libel are able to defend claims unhindered by the passage of time and the loss of notes and fading of memories that such passage of time inevitably entails. In determining the length of any limitation period, the protection of the right to freedom of expression enjoyed by the press should be balanced against the rights of individuals to protect their reputations and, where necessary, to have access to a court in order to do so. It is, in principle, for contracting States, in the exercise of their margin of appreciation, to set a limitation period which is appropriate and to provide for any cases in which an exception to the prescribed limitation period may be permitted (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, §§ 54-55, *Reports of Judgments and Decisions* 1996IV).

47. On the facts of the present case, the Court considers it significant that, although libel proceedings in respect of the two articles were initi-

ated in December 1999, the applicant did not add any qualification to the articles in its Internet archive until December 2000. The Court recalls the conclusion of the Court of Appeal that the attachment of a notice to archive copies of material which it is known may be defamatory would "normally remove any sting from the material". To the extent that the applicant maintains that such an obligation is excessive, the Court observes that the Internet archive in question is managed by the applicant itself. It is also noteworthy that the Court of Appeal did not suggest that potentially defamatory articles should be removed from archives altogether. In the circumstances, the Court, like the Court of Appeal, does not consider that the requirement to publish an appropriate qualification to an article contained in an Internet archive, where it has been brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press, constitutes a disproportionate interference with the right to freedom of expression. The Court further notes that the brief notice which was eventually attached to the archive would appear to undermine the applicant's argument that any qualification would be difficult to formulate.

48. Having regard to this conclusion, it is not necessary for the Court to consider in detail the broader chilling effect allegedly created by the application of the Internet publication rule in the present case. The Court nonetheless observes that the two libel actions brought against the applicant concerned the same two articles. The first action was brought some two to three months after the publication of the articles and well within the one-year limitation period. The second action was brought a year later, some 14 or 15 months after the initial publication of the articles. At the time the second action was filed, the legal proceedings in respect of the first action were still underway. There is no suggestion that the applicant was prejudiced in mounting its defence to the libel proceedings in respect of the Internet publication due to the passage of time. In these circumstances, the problems linked to ceaseless liability for libel do not arise. The Court would, however, emphasise that while an aggrieved applicant must be afforded a real opportunity to vindicate his right to reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10.

49. The foregoing considerations are sufficient to enable the Court to conclude that in the present case, the finding by the domestic courts in the second action that the applicant had libelled the claimant by the continued publication on the Internet of the two articles was a justified and proportionate restriction on the applicant's right to freedom of expression.

50. There has accordingly been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the remainder of the application admissible;
2. *Holds* that there has been no violation of Article 10 of the Convention.

European Court of Justice

SCHMIDBERGER, 12 JUNE 2003 - C122/00

JUDGMENT OF THE COURT

(Free movement of goods - Restriction resulting from actions of individuals - Obligations of the Member States - Decision not to prohibit a demonstration by environmental protesters which resulted in the complete closure of the Brenner motorway for almost 30 hours - Justification - Fundamental rights - Freedom of expression and freedom of assembly - Principle of proportionality)

In Case C-112/00, REFERENCE to the Court under Article 234 EC by the Oberlandesgericht Innsbruck (Austria) for a preliminary ruling in the proceedings pending before that court between **Eugen Schmidberger, Internationale Transporte und Planzüge** and **Republic of Austria,** on the interpretation of Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC) read together with Article 5 of the EC Treaty (now Article 10 EC), and on the conditions for liability of a Member State for damage caused to individuals by a breach of Community law,

1. By order of 1 February 2000, received at the Court on 24 March 2000, the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) referred under Article 234 EC six questions for a preliminary ruling on the interpretation of Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC) read together with Article 5 of the EC Treaty (now Article 10 EC), and on the conditions for liability of a Member State for damage caused to individuals by a breach of Community law.

2. Those questions were raised in proceedings between Eugen Schmidberger, Internationale Transporte und Planzüge ('Schmidberger') and the Republic of Austria concerning the permission implicitly granted by the competent authorities of that Member State to an environmental group to organise a demonstration on the Brenner motorway, the effect of which was to completely close that motorway to traffic for almost 30 hours.

National law

3. Paragraph 2 of the Versammlungsgesetz (Law on assembly) of 1953, as subsequently amended ('VslgG') provides:

'(1) A person desirous of arranging a popular meeting or any meeting accessible to the public and not limited to invited guests must give written notice thereof to the authority (Paragraph 16) at least 24 hours in advance of the proposed event, stating the purpose, place and time of the meeting. The notice must reach the authority at least 24 hours before the time of the proposed meeting.

(2) On demand the authority shall forthwith issue a certificate concerning the notice...'.

4. Paragraph 6 of the VslgG provides:

'Meetings whose purpose runs counter to the criminal law or which, if held, are likely to endanger public order or the common weal are to be banned by the authorities.'

5. Paragraph 16 of the VslgG provides:

'For the purposes of the present law, the usual meaning of the authority is:

(a) in places within their competence, the Federal Police;

(b) in the place where the Landeshauptmann [head of government of the Land] has his seat of government, where there is no Federal Police presence, the Sicherheitsdirektion [the security services];...

(c) in all other places, the Bezirksverwaltungsbehörde [district administrative authority]'.

6. Paragraph 42(1) of the Straßenverkehrs-ordnung (Highway Code) of 1960, as subsequently amended ('the StVO'), prohibits the transport by road of heavy goods trailers on Saturdays from 15.00 hrs to midnight and on Sundays and bank holidays from midnight to 22.00 hrs where the maximum permitted total weight of the heavy goods vehicle or of the trailer exceeds 3.5 tonnes. Further, according to Paragraph 42(2), during the periods stated in Paragraph 42(1) the movement of heavy goods vehicles, articulated lorries and rigid-chassis lorries having a maximum permitted total weight in excess of 7.5 tonnes is prohibited. Certain exceptions are permitted, in particular for the transport of milk, perishable foodstuffs or animals for slaughter (except for the transport of cattle on motorways).

7.Under Paragraph 42(6) of the StVO, the movement of heavy goods vehicles having a maximum permitted total weight in excess of 7.5 tonnes is prohibited between 22.00 hrs and 05.00 hrs. The

journeys made by vehicles emitting noise below a certain level are not affected by that prohibition.
8. Pursuant to Paragraph 45(2) et seq. of the StVO, derogations in respect of road use may be granted in respect of individual applications and subject to certain conditions.
9. Paragraph 86 of the StVO provides:

'Marches. Unless provided otherwise, where it is intended to use a road for outdoor meetings, public or customary marches, local fêtes, parades or other such assemblies, these must be declared in advance by their organisers to the authority...'.

The main proceedings and the questions referred for a preliminary ruling

10. According to the file in the main proceedings, on 15 May 1998 the Transitforum Austria Tirol, an association 'to protect the biosphere in the Alpine region', gave notice to the Bezirkshauptmannschaft Innsbruck (Innsbruck provincial government) under Paragraph 2 of the VslgG and Paragraph 86 of the StVO of a demonstration to be held from 11.00 hrs on Friday 12 June 1998 to 15.00 hrs on Saturday 13 June 1998 on the Brenner motorway (A13), resulting in that motorway being closed to all traffic on the section from the Europabrücke service area to the Schönberg toll station (Austria).
11. On the same day, the chairman of that association gave a press conference following which the Austrian and German media disseminated information concerning the closure of the Brenner motorway. The German and Austrian motoring organisations were also notified and they too offered practical information to motorists, advising them in particular to avoid that motorway during the period in question.
12. On 21 May 1998, the Bezirks-hauptmannschaft requested the Sicherheits-direktion für Tirol (Directorate of security for Tyrol) to provide instructions concerning the proposed demonstration. On 3 June 1998, the Sicherheitsdirektor issued an order that it was not to be banned. On 10 June 1998, there was a meeting of members of various local authorities in order to ensure that the demonstration would be free of trouble.
13. Considering that that demonstration was lawful as a matter of Austrian law, the Bezirkshauptmannschaft decided not to ban it, but it did not consider whether its decision might infringe Community law.
14. The demonstration took place at the stated place and time. Consequently, heavy goods vehicles which should have used the Brenner motorway were immobilised from 09.00 hrs on Friday 12 June 1998. The motorway was reopened to traffic on Saturday 13 June 1998 at approximately 15.30 hrs, subject to the prohibition on the movement of lorries in excess of 7.5 tonnes during certain hours on Saturdays and Sundays applicable under Austrian legislation.
15. Schmidberger is an international transport undertaking based at Rot an der Rot (Germany) which operates six articulated heavy goods vehicles with 'reduced noise and soot emission'. Its main activity is the transport of timber from Germany to Italy and steel from Italy to Germany. Its vehicles generally use the Brenner motorway for that purpose.
16. Schmidberger brought an action before the Landesgericht Innsbruck (Innsbruck Regional Court) (Austria) seeking damages of ATS 140 000 against the Republic of Austria on the basis that five of its lorries were unable to use the Brenner motorway for four consecutive days because, first, Thursday 11 June 1998 was a bank holiday in Austria, whilst 13 and 14 June 1998 were a Saturday and Sunday, and second, the Austrian legislation prohibits the movement of lorries in excess of 7.5 tonnes most of the time at weekends and on bank holidays. That motorway is the sole transit route for its vehicles between Germany and Italy. The failure on the part of the Austrian authorities to ban the demonstration and to intervene to prevent that trunk route from being closed amounted to a restriction of the free movement of goods. Since it could not be justified by the protesters' right to freedom of expression and freedom of assembly the restriction was a breach of Community law in respect of which the Member State concerned incurred liability. In the present case, the damage suffered by Schmidberger consisted of the immobilisation of its heavy goods vehicles (ATS 50 000), the fixed costs in respect of the drivers (ATS 5 000) and a loss of profit arising from concessions on payment allowed to customers on account of the substantial delays in transporting the goods and the failure to make six journeys between Germany and Italy (ATS 85 000).
17. The Republic of Austria contended that the claim should be rejected on the grounds that the decision not to ban the demonstration was taken following a detailed examination of the facts, that information as to the date of the closure of the Brenner motorway had been announced in advance in Austria, Germany and Italy, and that the demonstration did not result in substantial traffic jams or other incidents. The restriction on free movement arising from a demonstration is permitted provided that the obstacle it creates is

neither permanent nor serious. Assessment of the interests involved should lean in favour of the freedoms of expression and assembly, since fundamental rights are inviolable in a democratic society.

18. Having found that Schmidberger had not shown either that its lorries would have had to use the Brenner motorway on 12 and 13 June 1998 or that it had not been possible, after it had become aware that the demonstration was due to take place, to change its routes in order to avoid loss, the Landesgericht Innsbruck dismissed the action by judgment of 23 September 1999 on the grounds that the transport company had neither discharged the burden (under Austrian substantive law) of making out and proving its claim for pecuniary loss nor complied with its obligation (under Austrian procedural law) to present all the facts on which the application was based and which were necessary for the dispute to be determined.

19. Schmidberger then lodged an appeal against that judgment before the Oberlandesgericht Innsbruck, which considers that it is necessary to have regard to the requirements of Community law where, as in the present case, claims are made which are, at least in part, founded on Community law.

20. It considers that it is necessary in that regard to determine first whether the principle of the free movement of goods, possibly in conjunction with Article 5 of the Treaty, requires a Member State to keep open major transit routes and whether that obligation takes precedence over fundamental rights such as the freedom of expression and the freedom of assembly guaranteed by Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

21. If so, the national court asks, secondly, whether the breach of Community law thus established is sufficiently serious to give rise to State liability. Questions of interpretation arise in particular in determining the degree of precision and clarity of Article 5 as well as Articles 30, 34 and 36 of the Treaty.

22. In the present case State liability might be incurred as a result of either legislative defect - the Austrian legislature having failed to adapt the legislation on freedom of assembly to comply with the obligations arising under Community law, in particular under the principle of the free movement of goods - or by reason of administrative fault - the competent national authorities being required by the obligation of cooperation and loyalty laid down by Article 5 of the Treaty to interpret national law in such a way as to comply with the requirements of that Treaty as regards the free movement of goods, in so far as those obligations arising from Community law are directly applicable.

23. Thirdly, the court seeks guidance as to the nature and extent of the right to compensation based on State liability. It asks how stringent are the requirements as to proof of the cause and amount of the damage occasioned by a breach of Community law resulting from legislation or administrative action and wishes to know, in particular, whether a right to compensation also exists where the amount of the damage can only be assessed by general estimate.

24. Lastly, the referring court harbours doubts as to the national requirements for establishing a right to compensation based on State liability. It asks whether the Austrian rules on the burden and standard of proof and on the obligation to submit all facts necessary for the determination of the dispute comply with the principle of legal effectiveness, in so far as the rights based on Community law cannot always be defined *ab initio* in their entirety and the applicant faces genuine difficulty in stating correctly all the facts required under Austrian law. Thus, in the present case, the content of the right to compensation based on State liability is so unclear, as regards its nature and extent, as to make a reference for a preliminary ruling necessary. The reasoning of the court ruling at first instance is likely to curtail claims based on Community law by rejecting the application on the basis of principles of national law and circumventing on purely formal grounds relevant questions of Community law.

25. Considering that the resolution of the dispute thus required an interpretation of Community law, the Oberlandesgericht Innsbruck decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Are the principles of the free movement of goods under Article 30 et seq. of the EC Treaty (now Article 28 et seq. EC), or other provisions of Community law, to be interpreted as meaning that a Member State is obliged, either absolutely or at least as far as reasonably possible, to keep major transit routes clear of all restrictions and impediments, inter alia, by requiring that a political demonstration to be held on a transit route, of which notice has been given, may not be authorised or must at least be later dispersed, if or as soon as it can also be held at a place away from the transit route with a comparable effect on public awareness?

2. Where, on account of the failure by a Member State to indicate in its national provisions on freedom of assembly and the right to exercise it that, in the weighing of freedom of assembly against the public interest, the principles of Community law, primarily the fundamental freedoms and, in this particular case, the provisions on the free movement of goods, are also to be observed, a political demonstration of 28 hours' duration is authorised and held which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, inter alia, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that failure constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State under the principles of Community law, provided that the other requirements for such liability are met?

3. Where a national authority decides that there is nothing in the provisions of Community law, in particular those concerning the free movement of goods and the general duty of cooperation and solidarity under Article 5 of the EC Treaty (now Article 10 EC), to preclude, and thus no ground on which to ban, a political demonstration of 28 hours' duration which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, inter alia, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that decision constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State under the principles of Community law, provided that the other requirements for such liability are met?

4. Is the objective of an officially authorised political demonstration, namely that of working for a healthy environment and of drawing attention to the danger to public health caused by the constant increase in the transit traffic of heavy goods vehicles, to be deemed to be of a higher order than the provisions of Community law on the free movement of goods under Article 28 EC?

5. Is there loss giving rise to a claim founded on State liability where the person incurring the loss can prove that he was in a position to earn income, in the present case from the international transport of goods by means of the heavy goods vehicles operated by him but rendered idle by the 28 hour demonstration, yet is unable to prove the loss of a specific transport journey?

6. If the reply to Question 4 is in the negative:
In order to comply with the obligation of cooperation and solidarity incumbent under Article 5 of the EC Treaty (now Article 10 EC) on national authorities, in particular the courts, and with the principle of effectiveness, must application of national rules of substantive or procedural law curtailing the ability to assert claims which are well founded under Community law, such as in the present case a claim founded on State liability, be deferred pending full elucidation of the substance of the claim at Community law, if necessary following a reference to the Court of Justice for a preliminary ruling?'

Admissibility

26. The Republic of Austria harbours doubts as to the admissibility of the present reference and submits essentially that the questions referred by the Oberlandesgericht Innsbruck are purely hypothetical and irrelevant to the determination of the dispute in the main proceedings.

27. The legal action brought by Schmidberger, seeking to establish the liability of a Member State for breach of Community law, requires the company to adduce evidence of genuine damage resulting from the alleged breach.

28. Before the two national courts successively seised of the dispute Schmidberger failed to establish either the existence of specific individual loss - by substantiating with specific evidence the statement that its heavy goods vehicles had to use the Brenner motorway on the days when the demonstration took place there, as part of transport operations between Germany and Italy - or, if appropriate, that it had complied with its obligation to mitigate the damage that it claims to have suffered, by explaining why it was not able to choose a route other than the one closed.

29. In those circumstances, answers to the questions referred are not necessary in order to enable the referring court to decide the case or, at least, the request for a preliminary ruling is premature as long as the facts have not been found and relevant evidence has not been fully adduced before that court.

30. In that regard, according to settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, *inter alia*, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 33; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 18; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 31).

31. In the context of that cooperation, it is for the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-153/00 *Der Weduwe* [2002] ECR I-0000, paragraph 31, and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-0000, paragraph 41).

32. However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court (see, to that effect, *PreussenElektra*, cited above, paragraph 39). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (*Bosman*, paragraph 60; *Der Weduwe*, paragraph 32, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 42).

33. Thus, the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Bosman*, paragraph 61, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 43).

34. In the present case, it is by no means clear that the questions referred by the national court fall within one or other of the situations referred to in the case-law cited in the preceding paragraph.

35. The action brought by Schmidberger seeks compensation from the Republic of Austria for the damage which the alleged breach of Community law is said to have caused it, consisting in the fact that the Austrian authorities did not ban the demonstration which resulted in the Brenner motorway being closed to all traffic for a continuous period of almost 30 hours.

36. It follows that the request for an interpretation of Community law made by the national court has undeniably arisen in the context of a genuine dispute between the parties to the main proceedings and which cannot therefore be regarded as hypothetical.

37. Furthermore, it is apparent from the order for reference that the national court has set out in precise and detailed terms the reasons why it considers it necessary for the determination of the dispute before it to refer to the Court various questions on the interpretation of Community law including, in particular, that relating to the factors to be taken into account when taking evidence of the damage allegedly suffered by Schmidberger.

38. Moreover, it follows from the observations submitted by the Member States in response to the notification of the order for reference and by the Commission pursuant to Article 23 of the EC Statute of the Court of Justice that the information in that order enabled them properly to state their position on all the questions submitted to the Court.

39. It is clear from the second paragraph of Article 234 EC that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5, and Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 30).

40. It is equally undeniable that the referring court has defined to the requisite legal standard both the factual and legal context of its request for interpretation of Community law and that it has provided the Court with all the information necessary to enable it to reply usefully to that request.

41. Furthermore, it is logical that the referring court requests the Court, first, to determine which types of damage can be taken into consideration for the purposes of State liability for breach of Community law - and, in particular, requests it to clarify the question whether compensation is in respect only of damage in fact suffered or if it also covers loss of profit based on general estimates, and whether and to what extent the victim must try to avoid or mitigate that loss -, before that court rules on the specific evidence recognised as being relevant by the

Court in the assessment of the damage in fact suffered by Schmidberger.
42. Lastly, in the context of an action for liability on the part of a Member State, the referring court not only asks the Court about the requirement that there be damage and the forms which that may take and the detailed rules of evidence in that regard, but also considers it necessary to pose several questions on the other requirements to be met in making out a claim based on such liability and, in particular, as to whether the conduct of the relevant national authorities in the main case constitutes a breach of Community law and whether that breach is such as to entitle the alleged victim to compensation.
43. In the light of the foregoing, it cannot be maintained that as regards the main proceedings the Court is called upon to rule on a question which is purely hypothetical or irrelevant for the purposes of the decision which the national court is called upon to give.
44. On the contrary, it follows from those considerations that the questions referred by that court meet an objective need for the purpose of settling the dispute before it, in the course of which it is called upon to give a decision capable of taking account of the Court's judgment, and the information provided to the latter, in particular in the order for reference, enables it to reply usefully to those questions.
45. Consequently, the reference for a preliminary ruling made by the Oberlandesgericht Innsbruck is admissible.

The questions referred for a preliminary ruling

46. It should be noted at the outset that the questions referred by the national court raise two distinct, albeit related, issues.
47. First, the Court is asked to rule on whether the fact that the Brenner motorway was closed to all traffic for almost 30 hours without interruption, in circumstances such as those at issue in the main proceedings, amounts to a restriction of the free movement of goods and must therefore be regarded as a breach of Community law. Second, the questions relate more specifically to the circumstances in which the liability of a Member State may be established in respect of damage caused to individuals as a result of an infringement of Community law.
48. On the latter question, the national court asks in particular for clarification of whether, and if so to what extent, in circumstances such as those of the case before it, the breach of Community law - if made out - is sufficiently manifest and serious to give rise to liability on the part of the Member State concerned. It also asks the Court about the nature and evidence of the damage to be compensated.
49. Given that, logically, this second series of questions need be examined only if the first issue, as defined in the first sentence of paragraph 47 of the present judgment, is answered in the affirmative, the Court must first give a ruling on the various points raised by that issue, which is essentially the subject of the first and fourth questions.
50. In the light of the evidence in the file of the main case sent by the referring court and the written and oral observations presented to the Court, those questions must be understood as seeking to determine whether the fact that the authorities of a Member State did not ban a demonstration with primarily environmental aims which resulted in the complete closure of a major transit route, such as the Brenner motorway, for almost 30 hours without interruption amounts to an unjustified restriction of the free movement of goods which is a fundamental principle laid down by Articles 30 and 34 of the Treaty, read together, if necessary, with Article 5 thereof.

Whether there is a restriction of the free movement of goods

51. It should be stated at the outset that the free movement of goods is one of the fundamental principles of the Community.
52. Thus, Article 3 of the EC Treaty (now, after amendment, Article 3 EC), inserted in the first part thereof, entitled 'Principles', provides in subparagraph (c) that for the purposes set out in Article 2 of the Treaty the activities of the Community are to include an internal market characterised by the abolition, as between Member States, of obstacles to *inter alia* the free movement of goods.
53. The second paragraph of Article 7a of the EC Treaty (now, after amendment, Article 14 EC) provides that the internal market is to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.
54. That fundamental principle is implemented primarily by Articles 30 and 34 of the Treaty.
55. In particular, Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Similarly, Article 34 prohibits, between Member States, quantitative restric-

tions on exports and all measures having equivalent effect.
56. It is settled case-law since the judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5) that those provisions, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade (see, to that effect, Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 29).
57. In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State (*Commission* v *France*, cited above, paragraph 30).
58. The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act (*Commission* v *France*, cited above, paragraph 31).
59. Consequently, Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory (*Commission* v *France*, cited above, paragraph 32). Article 5 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of that Treaty.
60. Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods.
61. Paragraph 53 of the judgment in *Commission* v *France*, cited above, shows that the case giving rise to that judgment concerned not only imports but also the transit through France of products from other Member States.
62. It follows that, in a situation such as that at issue in the main proceedings, where the competent national authorities are faced with restrictions on the effective exercise of a fundamental freedom enshrined in the Treaty, such as the free movement of goods, which result from actions taken by individuals, they are required to take adequate steps to ensure that freedom in the Member State concerned even if, as in the main proceedings, those goods merely pass through Austria en route for Italy or Germany.
63. It should be added that that obligation of the Member States is all the more important where the case concerns a major transit route such as the Brenner motorway, which is one of the main land links for trade between northern Europe and the north of Italy.
64. In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.

Whether the restriction may be justified

65. In the context of its fourth question, the referring court asks essentially whether the purpose of the demonstration on 12 and 13 June 1998 - during which the demonstrators sought to draw attention to the threat to the environment and public health posed by the constant increase in the movement of heavy goods vehicles on the Brenner motorway and to persuade the competent authorities to reinforce measures to reduce that traffic and the pollution resulting therefrom in the highly sensitive region of the Alps - is such as to frustrate Community law obligations relating to the free movement of goods.
66. However, even if the protection of the environment and public health, especially in that region, may, under certain conditions, constitute

a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods, it should be noted, as the Advocate General pointed out at paragraph 54 of his Opinion, that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State in respect of an alleged breach of Community law, since that liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.

67. Indeed, for the purposes of determining the conditions in which a Member State may be liable and, in particular, with regard to the question whether it infringed Community law, account must be taken only of the action or omission imputable to that Member State.

68. In the present case, account should thus be taken solely of the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question.

69. It is apparent from the file in the main case that the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution.

70. In its order for reference, the national court also raises the question whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.

71. According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25).

72. The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union (*Bosman*, cited above, paragraph 79). That provision states that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

73. It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community (see, *inter alia*, *ERT*, cited above, paragraph 41, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14).

74. Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.

75. It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR (see to that effect, *inter alia*, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 28).

76. In the present case, the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty.

77. The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.

78. First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public inter-

est, in accordance with the Court's consistent case-law since the judgment in Case 120/78 *Rewe-Zentral* (*'Cassis de Dijon'*) [1979] ECR 649.

79. Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42, and Eur. Court HR, Steel and Others v. The United Kingdom judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 101).

80. Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed (see, to that effect, Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 P *X* v *Commission* [1994] ECR I-4737, paragraph 18).

81. In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.

82. The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.

83. As regards the main case, it should be emphasised at the outset that the circumstances characterising it are clearly distinguishable from the situation in the case giving rise to the judgment in *Commission* v *France*, cited above, referred to by Schmidberger as a relevant precedent in the course of its legal action against Austria.

84. By comparison with the points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in *Commission* v *France*, cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it.

85. Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in *Commission* v *France*, cited above.

86. Third, it is not in dispute that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; it is also not in dispute that the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source. By contrast, in *Commission* v *France*, cited above, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic, by not only obstructing the transport of the goods in question, but also destroying those goods in transit to or through France, and even when they had already been put on display in shops in the Member State concerned.

87. Fourth, in the present case various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly. Well before the date on which it was due to take place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic operators concerned were duly informed of the traffic restrictions applying

on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions. Furthermore, security arrangements had been made for the site of the demonstration.
88. Moreover, it is not in dispute that the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in *Commission* v *France*, cited above.
89. Finally, concerning the other possibilities envisaged by Schmidberger with regard to the demonstration in question, taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.
90. The imposition of stricter conditions concerning both the site - for example by the side of the Brenner motorway - and the duration - limited to a few hours only - of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.
91. An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.
92. In that regard, the Republic of Austria submits, without being contradicted on that point, that in any event, all the alternative solutions which could be countenanced would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the group organising the demonstration or acts of violence on the part of the demonstrators who considered that the exercise of their fundamental rights had been infringed.
93. Consequently, the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.
94. In the light of those considerations, the answer to the first and fourth questions must be that the fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the Treaty, read together with Article 5 thereof.

The conditions for liability of the Member State

95. It follows from the answer given to the first and fourth questions that, having regard to all the circumstances of a case such as that before the referring court, the competent national authorities cannot be said to have committed a breach of Community law such as to give rise to liability on the part of the Member State concerned.
96. In those circumstances, there is no need to rule on the other questions referred concerning some of the conditions necessary for a Member State to incur liability for damage caused to individuals by that Member State's infringement of Community law.

Costs

97. The costs incurred by the Austrian, Greek, Italian, Netherlands and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberlandesgericht Innsbruck by order of 1 February 2000, hereby rules:
The fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the EC Treaty (now, after amendment, Articles 28 EC and 29

EC), read together with Article 5 of the EC Treaty (now Article 10 EC).

Recommendations / Declarations / Resolutions of the Council of Europe

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, RECOMMENDATION NO. R (2000) 7 ON THE RIGHT OF JOURNALISTS NOT TO DISCLOSE THEIR SOURCES OF INFORMATION

Adopted 8 March 2000

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,
Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;
Recalling the commitment of the member states to the fundamental right to freedom of expression as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms;
Reaffirming that the right to freedom of expression and information constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and the development of every individual, as expressed in the Declaration on the Freedom of Expression and Information of 1982;
Reaffirming the need for democratic societies to secure adequate means of promoting the development of free, independent and pluralist media;
Recognising that the free and unhindered exercise of journalism is enshrined in the right to freedom of expression and is a fundamental prerequisite to the right of the public to be informed on matters of public concern;
Convinced that the protection of journalists' sources of information constitutes a basic condition for journalistic work and freedom as well as for the freedom of the media;
Recalling that many journalists have expressed in professional codes of conduct their obligation not to disclose their sources of information in case they received the information confidentially;
Recalling that the protection of journalists and their sources has been established in the legal systems of some member states;
Recalling also that the exercise by journalists of their right not to disclose their sources of information carries with it duties and responsibilities as expressed in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms;
Aware of the Resolution of the European Parliament of 1994 on confidentiality for journalists' sources and the right of civil servants to disclose information;
Aware of Resolution No. 2 on journalistic freedoms and human rights of the 4th European Ministerial Conference on Mass Media Policy held in Prague in December 1994, and recalling Recommendation No. R (96) 4 on the protection of journalists in situations of conflict and tension,
Recommends to the governments of member states:
1. to implement in their domestic law and practice the principles appended to this recommendation,
2. to disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and
3. to bring them in particular to the attention of public authorities, police authorities and the judiciary as well as to make them available to journalists, the media and their professional organisations.

Appendix to Recommendation No. R (2000) 7

Principles concerning the right of journalists not to disclose their sources of information

Definitions

For the purposes of this Recommendation:
a. the term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication;
b. the term "information" means any statement of fact, opinion or idea in the form of text, sound and/or picture;
c. the term "source" means any person who provides information to a journalist;
d. the term "information identifying a source" means, as far as this is likely to lead to the identification of a source:
i. the name and personal data as well as voice and image of a source,
ii. the factual circumstances of acquiring information from a source by a journalist,
iii. the unpublished content of the information provided by a source to a journalist, and

iv. personal data of journalists and their employers related to their professional work.

Principle 1 (Right of non-disclosure of journalists)

Domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

Principle 2 (Right of non-disclosure of other persons)

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

Principle 3 (Limits to the right of non-disclosure)

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member states shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph *b*, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,
- the circumstances are of a sufficiently vital and serious nature,
- the necessity of the disclosure is identified as responding to a pressing social need, and
- member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

Principle 4 (Alternative evidence to journalists' sources)

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

Principle 5 (Conditions concerning disclosures)

a. The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

b. Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.

c. Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.

d. Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial authority.

e. Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.

Principle 6 (Interception of communication, surveillance and judicial search and seizure)

a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:
i. interception orders or actions concerning communication or correspondence of journalists or their employers,
ii. surveillance orders or actions concerning journalists, their contacts or their employers, or
iii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

Principle 7 (Protection against self-incrimination)

The principles established herein shall not in any way limit national laws on the protection against self-incrimination in criminal proceedings, and journalists should, as far as such laws apply, enjoy such protection with regard to the disclosure of information identifying a source.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, RECOMMENDATION REC (2003)13 ON THE PROVISION OF INFORMATION THROUGH THE MEDIA IN RELATION TO CRIMINAL PROCEEDINGS

Adopted 10 July 2003

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Recalling the commitment of the member states to the fundamental right to freedom of expression and information as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention"), which constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every individual;

Recalling that the media have the right to inform the public due to the right of the public to receive information, including information on matters of public concern, under Article 10 of the Convention, and that they have a professional duty to do so;

Recalling that the rights to presumption of innocence, to a fair trial and to respect for private and family life under Articles 6 and 8 of the Convention constitute fundamental requirements which must be respected in any democratic society;

Stressing the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system;

Considering the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention;

Recalling, furthermore, the right of the media and journalists to create professional associations, as guaranteed by the right to freedom of association under Article 11 of the Convention, which is a basis for self-regulation in the media field;

Aware of the many initiatives taken by the media and journalists in Europe to promote the responsible exercise of journalism, either through self-regulation or in co-operation with the state through co-regulatory frameworks;

Desirous to enhance an informed debate on the protection of the rights and interests at stake in the context of media reporting relating to criminal proceedings, and to foster good practice throughout Europe while ensuring access of the media to criminal proceedings;

Recalling its Resolution (74) 26 on the right of reply - position of the individual in relation to

the press, its Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, its Recommendation No. R (97) 13 concerning the intimidation of witnesses and the rights of the defence, and its Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance;

Stressing the importance of protecting journalists' sources of information in the context of criminal proceedings, in accordance with its Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information;

Bearing in mind Resolution No. 2 on journalistic freedoms and human rights adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, December 1994) as well as the Declaration on a media policy for tomorrow adopted at the 6th European Ministerial Conference on Mass Media Policy (Cracow, June 2000);

Recalling that this recommendation does not intend to limit the standards already in force in member states which aim to protect freedom of expression,

Recommends, while acknowledging the diversity of national legal systems concerning criminal procedure, that the governments of member states:

1. take or reinforce, as the case may be, all measures which they consider necessary with a view to the implementation of the principles appended to this recommendation, within the limits of their respective constitutional provisions,

2. disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and

3. bring them in particular to the attention of judicial authorities and police services as well as to make them available to representative organisations of lawyers and media professionals.

Appendix to Recommendation Rec (2003) 13

Principles concerning the provision of information through the media in relation to criminal proceedings

Principle 1 - Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

Principle 2 - Presumption of innocence

Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.

Principle 3 - Accuracy of information

Judicial authorities and police services should provide to the media only verified information or information which is based on reasonable assumptions. In the latter case, this should be clearly indicated to the media.

Principle 4 - Access to information

When journalists have lawfully obtained information in the context of on-going criminal proceedings from judicial authorities or police services, those authorities and services should make available such information, without discrimination, to all journalists who make or have made the same request.

Principle 5 - Ways of providing information to the media

When judicial authorities and police services themselves have decided to provide information to the media in the context of on-going criminal proceedings, such information should be provided on a non-discriminatory basis and, wherever possible, through press releases, press conferences by authorised officers or similar authorised means.

Principle 6 - Regular information during criminal proceedings

In the context of criminal proceedings of public interest or other criminal proceedings which have gained the particular attention of the public, judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. In cases of criminal proceedings which continue for a long period, this information should be provided regularly.

Principle 7 - Prohibition of the exploitation of information

Judicial authorities and police services should not exploit information about on-going criminal proceedings for commercial purposes or purposes other than those relevant to the enforcement of the law.

Principle 8 - Protection of privacy in the context of on-going criminal proceedings

The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle.

Principle 9 - Right of correction or right of reply

Without prejudice to the availability of other remedies, everyone who has been the subject of incorrect or defamatory media reports in the context of criminal proceedings should have a right of correction or reply, as the case may be, against the media concerned. A right of correction should also be available with respect to press releases containing incorrect information which have been issued by judicial authorities or police services.

Principle 10 - Prevention of prejudicial influence

In the context of criminal proceedings, particularly those involving juries or lay judges, judicial authorities and police services should abstain from publicly providing information which bears a risk of substantial prejudice to the fairness of the proceedings.

Principle 11 - Prejudicial pre-trial publicity

Where the accused can show that the provision of information is highly likely to result, or has resulted, in a breach of his or her right to a fair trial, he or she should have an effective legal remedy.

Principle 12 - Admission of journalists

Journalists should be admitted to public court hearings and public pronouncements of judgements without discrimination and without prior accreditation requirements. They should not be excluded from court hearings, unless and as far as the public is excluded in accordance with Article 6 of the Convention.

Principle 13 - Access of journalists to courtrooms

The competent authorities should, unless it is clearly impracticable, provide in courtrooms a number of seats for journalists which is sufficient in accordance with the demand, without excluding the presence of the public as such.

Principle 14 - live reporting and recordings in court rooms

Live reporting or recordings by the media in court rooms should not be possible unless and as far as expressly permitted by law or the competent judicial authorities. Such reporting should be authorised only where it does not bear a serious risk of undue influence on victims, witnesses, parties to criminal proceedings, juries or judges.

Principle 15 - Support for media reporting

Announcements of scheduled hearings, indictments or charges and other information of relevance to legal reporting should be made available to journalists upon simple request by the competent authorities in due time, unless impracticable. Journalists should be allowed, on a non-discriminatory basis, to make or receive copies of publicly pronounced judgments. They should have the possibility to disseminate or communicate these judgments to the public.

Principle 16 - Protection of witnesses

The identity of witnesses should not be disclosed, unless a witness has given his or her prior consent, the identification of a witness is of public concern, or the testimony has already been given in public. The identity of witnesses should never be disclosed where this endangers their lives or security. Due respect shall be paid to protection programmes for witnesses, especially in criminal proceedings against organised crime or crime within the family.

Principle 17 - Media reporting on the enforcement of court sentences

Journalists should be permitted to have contacts with persons serving court sentences in prisons, as far as this does not prejudice the fair adminis-

tration of justice, the rights of prisoners and prison officers or the security of a prison.

Principle 18 - Media reporting after the end of court sentences

In order not to prejudice the re-integration into society of persons who have served court sentences, the right to protection of privacy under Article 8 of the Convention should include the right to protect the identity of these persons in connection with their prior offence after the end of their court sentences, unless they have expressly consented to the disclosure of their identity or they and their prior offence are of public concern again or have become of public concern again

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, EXPLANATORY MEMORANDUM TO RECOMMENDATION REC (2003) 13 ON THE PROVISION OF INFORMATION THROUGH THE MEDIA IN RELATION TO CRIMINAL PROCEEDINGS

I. Introduction

1. The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention on Human Rights or ECHR) guarantees freedom of expression and information under Article 10, the right to the presumption of innocence and to a fair trial under Article 6 and the right to respect for private and family life under Article 8.

2. The provision of information in relation to court proceedings, and in particular criminal proceedings, corresponds to the right of the public to be informed on matters of public concern, including justice. The right to a fair trial under Article 6 of the ECHR includes hearings in public and the public pronouncement of judgments. Openness to the public can be achieved by the media. However, Article 6 allows also for the exclusion of the public and the media from all or parts of the trial for a limited number of cases referred to in Article 6 itself. The exclusion of the media would also have to comply with the narrowly interpreted possible restrictions of freedom of expression and information under Article 10 of the ECHR. Where private information is disclosed during a trial, Article 8 of the ECHR may require the protection of the privacy of this information.

3. Prominent cases in several member states concerning the media and the courts have caused wide public attention and debate about such issues as secrecy of investigations, the influence by the media on witnesses and judges, the presence of media in courtrooms as well as audiovisual recordings of trials.

4. Against this background, in 1996, the Steering Committee on the Mass Media (CDMM) identified the issue of media reporting in relation to criminal proceedings as being of common interest to all member states, when it proposed the creation of a Group of Specialists on media law and human rights (MM-S-HR) with a view to developing common principles for the protection of freedom of the media as well as other fundamental rights of individuals at stake before, during and after criminal proceedings. After having analysed national laws and practices as well as the relevant case law of the European Court of Human Rights, the MM-S-HR drew up a draft Recommendation on the provision of information through the media in relation to criminal proceedings, which was finalised by the Steering Committee and its Group of Specialists on freedom of expression and other fundamental rights (MM-S-FR) in 2003.

5. The Committee of Ministers adopted Recommendation Rec(2003)13 at the 848th meeting of the Ministers' Deputies on 10 July 2003.

II. General commentary

6. This recommendation is addressed to governments of member states and hence their public authorities, including courts. Any recommendation of the Committee of Ministers is an instrument of political commitment, and not a legally enforceable instrument. Through its adoption by the Committee of Ministers, it binds all member states.

7. The recommendation does not seek to directly address the private sector, and in particular the media or journalists. It is at the discretion of the member states to use measures which they consider appropriate in order to safeguard and protect the rights and interests of everyone in relation to criminal proceedings as outlined in this

recommendation, depending on their respective circumstances and legal traditions.

8. The recommendation provides guidelines for public authorities in the light of Articles 6, 8 and 10 of the European Convention on Human Rights. It does not intend to alter these provisions as well as the obligations of member states under the Convention. Furthermore, it does not intend to limit the standards already in force in member states which aim to protect freedom of expression.

9. In the preamble of the recommendation, certain related recommendations and one resolution are recalled. Resolution (74) 26 on the right of reply recommends member states to recognise the right of reply and correction where media reports have been incorrect or otherwise infringe the rights of individuals. Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure includes the recommendation, that "information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or the particular status or personal situation and safety of the victim make such special protection necessary, either the trial before the judgment should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate". In Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence, member states are recommended to take appropriate legislative and practical measures to ensure that witnesses may testify freely and without intimidation. In the context of organised crime, the exclusion of the media and/or the public from all or part of the trial should be considered. Finally, Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance contains principles for media reporting without inciting to ethnic intolerance.

10. Following the case law of the European Court of Human Rights concerning journalists' sources, the MM-S-FR had elaborated Recommendation (2000) 7 on the right of journalists not to disclose their sources of information, which was adopted by the Committee of Ministers on 8 March 2000. Although the main focus of the present recommendation is on the right of the media to report about criminal proceedings, the MM-S-FR felt that Recommendation (2000) 7 should be referred to in this context, as journalists reporting about criminal proceedings might also disseminate information received from confidential sources. Recommendation (2000) 7 and Article 10 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, would generally protect those sources in such a case.

11. Member states are held "to disseminate widely this recommendation and its Appendix, where appropriate accompanied by a translation", as the dissemination of the recommendation is a prerequisite for its proper implementation.

III. Commentary to the Recommendation

12. The specific recommendations or principles appear in the Appendix to the recommendation. This Appendix is an integral part of the Recommendation itself. It is only for sake of clarity that the individual "principles concerning the provision of information through the media in relation to criminal proceedings" are grouped in the Appendix.

13. For the purposes of the recommendation, the term "criminal proceedings" shall be understood as any action taken by judicial authorities or police services as well as investigating bodies under the framework of penal law and procedure.

Principle 1 (Information of the public via the media)

14. Article 10 of the European Convention on Human Rights guarantees the right of the public to receive information of public concern. The principle of a public hearing and a public pronouncement of judgments under Article 6 ECHR is part of the fair administration of justice. Since media have a particular role in disseminating information to the public, they should be able to disseminate information about the activities of judicial authorities and police services. The right of the public to receive information on matters of public concern is of particular importance in this context; it includes the right for the media to freely report and comment on the functioning of the criminal justice system. The European Court of Human Rights established, for instance, that the media are one of the means by which politicians and public opinion can control and verify whether judges are discharging their heavy responsibilities in a manner which is in conformity with the aim which is the basis of the task entrusted to them.

Principle 2 (Presumption of innocence)

15. Article 6, paragraph 2 of the European Convention on Human Rights guarantees the right to the presumption of innocence. This right is primarily a procedural right vis-à-vis judicial authorities, which defines the burden of proof in criminal proceedings. However, the fair administration of justice requires also that the presumption of innocence is not prejudiced indirectly through opinions and information relating to pending criminal proceedings disseminated by the media. The European Court of Human Rights has stated that "journalists reporting on criminal proceedings currently taking place must, admittedly, ensure that they do not overstep the bounds imposed in the interests of the proper administration of justice and that they respect the accused's right to be presumed innocent" (Du Roy and Malaurie v. France (2000) para. 34). This being said, the Court holds that an absolute and general prohibition of media reporting about criminal proceedings would be unnecessary and impede the right of the press to inform the public about matters which, although relating to criminal proceedings, may be in the public interest (ibid., para. 35 and 36).

Principle 3 (Accuracy of information)

16. The accuracy of information is important for both the credibility of judicial authorities and police services as well as the credibility of the media. Therefore, Principle 3 recommends that only accurate information should be provided, i.e. information based on facts or reasonable assumptions. Where the information is based on such assumptions, this should be clearly indicated. Although the truth of information might finally be judged by a court of law only, this Principle shall prevent that inaccurate information is provided knowingly or even on purpose, since it could undermine the authority of the law enforcement authorities and of the judiciary as well as compromise the rights of the parties to criminal proceedings.

Principle 4 (Access to information)

17. Principle 4 recommends that journalists should not be excluded from access to information on an arbitrary basis, for instance due to personal, political or other reasons, where such information has already been obtained lawfully by other journalists.

18. National legal systems may also specifically grant access to official documents in this context in accordance with Articles 6 and 8 of the European Convention on Human Rights.

Principle 5 (Ways of providing information to the media)

19. Under Principle 5, judicial authorities and police services should provide their information to the media through organised and authorised channels, rather than by judicial and police officers on an individual basis. The term "authorised officers" is to be understood in a wide sense, indicating that the authority concerned should designate a staff member for that purpose. Other "similar authorised means" in the sense of this Principle could include, for instance, the provision of oral information by official spokespersons on the spot, as well as written information material about a particular criminal proceeding given to journalists in advance of a trial.

20. Some national judicial authorities and police services have developed their internal guidelines for contacts with the media, including rules for the preparation of press releases. Such internal guidelines might be useful for ensuring a high common standard among domestic authorities. This will enhance the reliability of information and should contribute to the quality of media reports. Under national law, police services may have less discretion than judicial authorities to provide information to the media concerning their work.

Principle 6 (Regular information during criminal proceedings)

21. Where journalists and the media are not informed about criminal proceedings which have gained the particular attention of the public through the persons involved, the seriousness of the facts or other circumstances of public concern, it is likely that journalists will pursue their own journalistic investigations. Such journalistic investigations conducted in parallel to judicial investigations may, under certain circumstances, bear the risk of having a negative effect on those judicial investigations, for example by publicly disclosing information, portraying witnesses or contacting criminal offenders. This being said, parallel journalistic investigations might also have positive effects, such as detecting witnesses or suspects.

22. Some member states have prescribed by domestic law the secrecy of criminal investigations and police inquiries as a fundamental procedural principle. As stated by the European Court of

Human Rights in its Du Roy and Malaurie judgment of 3 October 2000, however, an absolute secrecy of criminal investigations would not be compatible with Article 10 of the European Convention on Human Rights.

23. Principle 6 therefore recommends that, under such circumstances, judicial authorities and police services should keep the media informed during criminal investigations, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. If there is nothing new to report, judicial authorities and police services should also mention this.

Principle 7 (Prohibition of the exploitation of information)

24. The commercial exploitation of information about on-going criminal proceedings by judicial authorities and police services could undermine the impartiality of the judiciary and the police. In addition, it could exclude journalists and media from access to such information due to its cost. In the same vein, information should not be exploited for purposes other than those relevant to the enforcement of the law.

25. This Principle does not, however, exclude the charging of fees for the provision of information by judicial authorities or police services, in order to cover the expenses pertaining to the production and dissemination of that information.

Principle 8 (Protection of privacy in the context of criminal proceedings)

26. Everyone has the right to the protection of private and family life under Article 8 of the European Convention on Human Rights. Principle 8 recalls this protection for suspects, the accused, convicted persons and other parties to criminal proceedings, who must not be denied this right due to their involvement in such proceedings. The mere indication of the name of the accused or convicted may constitute a sanction which is more severe than the penal sanction delivered by the criminal court. It furthermore may prejudice the reintegration into society of the person concerned. The same applies to the image of the accused or convicted. Therefore, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle.

27. An even stronger protection is recommended to parties who are minors, to victims of criminal offences, to witnesses and to the families of suspects, the accused and convicted persons. In this respect, member states may also refer to Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure and Recommendation No. R (97) 13 concerning the intimidation of witnesses and the rights of the defence.

Principle 9 (Right of correction or right of reply)

28. Member states are recommended to recognise in their domestic law and practice a right of correction or reply or the possibility of bringing a complaint to a press council under Resolution (74) 26 on the right of reply. Principle 9 recalls this right in relation to criminal proceedings, where incorrect information may prejudice the presumption of innocence, for example. In addition, Principle 9 recommends granting such a right also against incorrect press releases of judicial authorities and police services, which would not otherwise qualify under Resolution (74) 26. Judicial authorities and police services should nevertheless bear in mind that there may be greater danger of prejudicial influence if they do not disclose information to the media.

Principle 10 (Prevention of prejudicial influence)

29. Opinions and information about matters which are the subject of criminal proceedings might, when they are disseminated publicly in the media, have a prejudicial influence on the presumption of innocence, as referred to in Principle 2. This risk is especially high where juries or lay judges are involved in criminal proceedings. Therefore, Principle 10 recommends that judicial authorities and police services should abstain from publicly providing information which bears a risk of substantial prejudicial influence to the fairness of the proceedings. In this context, the term "judicial authorities" shall also include prosecutors and investigating judges. The evaluation of the risk of prejudicial influence should be made on a case-by-case basis, in the light of the circumstances of each case.

Principle 11 (Prejudicial pre-trail publicity)

30. Virulent media reporting might, in exceptional and rare cases, have a negative influence on a given criminal proceeding, in particular on jury members, lay judges and witnesses. It is not the intention of this Recommendation to harmonise the legal remedies for accused under such cir-

cumstances. However, the MM-S-FR felt that a recommendation containing principles on the provision of information through the media in relation to criminal proceedings should also contain a principle recommending to member states that there should be an effective legal remedy, where the provision of information is likely to result, or has resulted, in a breach of the right to a fair trial.

Principle 12 (Admission of journalists)

31. Article 6 of the European Convention on Human Rights guarantees the fundamental right to a public hearing and the public pronouncement of a judgment. Such publicity is achieved by allowing the public to attend hearings and pronouncements of judgments, as far as members of the public are interested in attending, and depending on the capacity of the courtroom. Where seats in courtrooms are not sufficient to accommodate all persons interested, judicial authorities might also consider transmitting a hearing audio-visually to another courtroom, if such facilities exist.

32. By admitting the media to public hearings and pronouncements of judgments, much greater publicity can be achieved. Under certain circumstances, however, the fair administration of justice may require the exclusion of the public from all or part of a hearing under Article 6 of the ECHR.

33. Principle 12 recommends that journalists should be admitted to public court hearings and the public pronouncement of judgments without discrimination and without prior formal and pre-determined accreditation requirements. Any discrimination would be contrary to the freedom of the media as guaranteed under Article 10 of the ECHR and could lead to a lack of publicity required under Article 6 of the ECHR. As a general principle, the media should not be excluded from court hearings, unless and as far as the public is excluded in accordance with Article 6 of the ECHR.

Principle 13 (Access of journalists to courtrooms)

34. Since the media provide wider public access to court hearings through their reporting, courtrooms should accommodate a sufficient number of seats for journalists. Depending on the public interest in a given hearing, larger courtrooms with more seats should allow for greater accommodation. The latter obviously depends on the circumstances and the availability of courtrooms. The presence of the media should, however, not exclude the participation of individual members of the public.

Principle 14 (live reporting and recordings in courts rooms)

35. The live reporting or recording by the media of the voice or image of persons present at court hearings may have an undue influence on those persons. Witnesses may either be intimidated or attracted by cameras or the media, which might have an impact on their true reporting of facts. Victims may also feel intimidated by them. Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure as well as Recommendation No. R (97) 13 concerning the intimidation of witnesses and the rights of the defence refer to this phenomenon. For instance, pictures could be taken before the proceedings start. This being said, members States are entitled to take any legal provisions which they consider useful to protect certain categories of persons such as minors or handcuffed accused persons.

36. Principle 14 draws the attention of member states to such a possible influence and recommends that live reporting or recordings by the media in courtrooms should only be possible where expressly permitted by law or the competent judicial authorities. Such exceptional express permissions will provide a predictable and non-discriminatory legal framework. For instance, it might be determined that trials of historical importance can be recorded or filmed and possibly disseminated at a later stage. The same may be applied to criminal proceedings at a superior court instance, especially where such proceedings are a mere review of the law or essentially based on written submissions by the parties.

Principle 15 (Support for media reporting)

37. Judicial authorities may have an interest in supporting reporting about criminal proceedings by making available, upon simple request and where practicable, announcements of scheduled hearings, charges and other relevant information. Where they have such information, the media will be less likely to produce inaccurate reports which might have an undue influence on juries and lay judges or prejudice the presumption of innocence. Therefore, Principle 15 recommends providing such support in due time and where practicable. Such support should not be made subject to accreditation. During the pro-

ceedings, a representative of the court should be, as far as possible, available for the media in order to respond to their requests for clarification. Finally, journalists should be able to disseminate or communicate judgments to the public, without undermining the protection of privacy under Article 8 of the Convention of Human Rights.

Principle 16 (Protection of witnesses)

38. As mentioned above, media reporting about witnesses may have an intimidating effect on them, especially where the identity of a witness is disclosed. This might even be contrary to the witness protection under Recommendation No. R (97) 13 concerning the intimidation of witnesses and the rights of the defence. Therefore, Principle 16 recommends that the identity of witnesses should not be disclosed by the authorities to the media or by the media themselves, unless a witness has given his or her prior consent, the identity of a witness is of public concern, or the testimony has already taken place in public.

Principle 17 (Media reporting on the enforcement of court sentences)

39. Public scrutiny over the fair administration of justice is largely carried out through the media. The enforcement of court sentences is part of this administration of justice. Therefore, freedom of the media should include the possibility for journalists of having contacts with persons serving court sentences, as far as this does not prejudice the fair administration of justice, the rights of prisoners and prison officers or the security of a prison.

Principle 18 (Media reporting after the end of court sentences)

40. It is part of the fair administration of justice to allow for the re-integration into society of persons who have served their court sentences. Media reporting about cases and prisoners after the end of court sentences may prejudice such re-integration. Therefore, Principle 18 recommends that the right to the protection of privacy under Article 8 of the European Convention on Human Rights should include the identity of these persons and their prior offence, unless they and their prior offence are or have become of public concern. A simple anniversary of a crime would thus not be sufficient. However, persons and their offences may, for instance, be of public concern if those persons violate criminal law again or where their prior offence was a crime without a limitation period, such as crimes against humanity or genocide. The latter crimes are, for example, defined by the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes of 1974.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, DECLARATION ON THE PROVISION OF INFORMATION THROUGH THE MEDIA IN RELATION TO CRIMINAL PROCEEDINGS (2003)

Adopted 10 July 2003

The Committee of Ministers of the Council of Europe,

Recalling the commitment of the member states to the fundamental right to freedom of expression, as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention");

Reaffirming that the right to freedom of expression and information constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every individual, as expressed in its Declaration on the Freedom of Expression and Information of 1982;

Recalling the commitment to the fundamental right to the presumption of innocence and to a fair trial under Article 6 of the Convention and the fundamental right to respect for private and family life under Article 8 of the Convention;

Recalling furthermore the right of the media and journalists to create professional associations, as guaranteed by the right to freedom of association under Article 11 of the Convention, which is a basis for self-regulation in the media field;

Considering the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in

view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention;

Considering also the value which self-regulation by the media and co-regulation can have in striking such a balance;

Aware of the many initiatives taken by the media and journalists in Europe to promote the responsible exercise of journalism, either through self-regulation or in co-operation with the state through co-regulatory frameworks;

Aware also of the need to enhance an informed debate on the protection of the rights and interests at stake in the context of media reporting relating to criminal proceedings;

Desiring to strengthen the responsible exercise of journalism in this context, notably by promoting the adoption of good practice by the media through codes of conduct or other initiatives;

Concerned by the increasing commercialisation of information in the context of criminal proceedings;

Desiring at the same time to foster the right to freedom of expression and information in relation to criminal proceedings, in particular by ensuring access by the media to such proceedings;

Recalling its Resolution (74) 26 of the right of reply - position of the individual in relation to the press, its Recommendation No. (85) 11 on the position of the victim in the framework of criminal law and procedure, its Recommendation No. R (97) 13 concerning the intimidation of witnesses and the rights of the defence, its Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance and its Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information;

Bearing in mind Resolution No. 2 on journalistic freedoms and human rights adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, December 1994) as well as the Declaration on a media policy for tomorrow adopted at the 6th European Ministerial Conference on Mass Media Policy (Cracow, June 2000);

Aware of the seminars on media self-regulation organised by the Steering Committee on the Mass Media in Strasbourg on 7 and 8 October 1998, as well as by the European Commission and Germany in Saarbrücken from 19 to 21 April 1999;

Aware of the public consultation with media professionals which was conducted by the Steering Committee on the Mass Media in January 2002,

Calls on member states:

1. to encourage responsible reporting on criminal proceedings in the media by supporting the training of journalists in the field of law and court procedure, in co-operation with the media and their professional organisations, educational institutions and the courts, in so far this is necessary for understanding court proceedings and the rights and interests of the parties to criminal proceedings and the state which are at stake during such proceedings;

2. to support any self-regulatory initiatives by which the media define professional ethical standards with regard to media reports on criminal proceedings in order to ensure respect for the principles contained in Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings;

3. to seek co-operation with self-regulatory bodies in the media field;

4. to involve professional associations in the media field in the relevant legislative processes concerning media reporting on criminal proceedings, for example via hearings or consultations;

5. to make this Declaration available to the public authorities and the courts as well as to the media, journalists and their professional organisations.

Invites the media and journalists:

1. to organise themselves in voluntary professional associations and foster pan-European co-operation between such associations;

2. to draw up professional ethical guidelines and standards for journalists, especially in relation to media reports on criminal proceedings, where such guidelines and standards do not yet exist, and to foster compliance with such professional ethical guidelines and standards;

3. to treat in their reports both suspects and accused as innocent until found guilty by a court of law, given that they enjoy that right under Article 6 of the Convention;

4. to respect the dignity, the security and, unless the information is of public concern, the right to privacy of victims, claimants, suspects, accused, convicted persons and witnesses as well as of their families, as guaranteed under Article 8 of the Convention;

5. not to recall a former offence of a person, unless it is of public concern or has become of public concern again;

6. to be sensitive to the interests of minors and other vulnerable persons involved in criminal proceedings;

7. to avoid prejudicing criminal investigations and court proceedings;

8. to avoid prejudicial and pejorative references in their reports on criminal proceedings, where these are likely to incite xenophobia, discrimination or violence;

9. to entrust reporting on criminal proceedings to journalists with adequate training in these matters.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, DECLARATION ON FREEDOM OF COMMUNICATION ON THE INTERNET (2003)

Adopted 28 May 2003

The member states of the Council of Europe,

Recalling the commitment of member states to the fundamental right to freedom of expression and information, as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Considering that freedom of expression and the free circulation of information on the Internet need to be reaffirmed;

Aware at the same time of the need to balance freedom of expression and information with other legitimate rights and interests, in accordance with Article 10, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Recalling in this respect the Convention on Cybercrime and Recommendation Rec(2001)8 on self-regulation concerning cyber content;

Recalling, furthermore, Resolution No. 1 of the 5th European Ministerial Conference on Mass Media Policy (Thessaloniki, 11-12 December 1997);

Concerned about attempts to limit public access to communication on the Internet for political reasons or other motives contrary to democratic principles;

Convinced of the necessity to state firmly that prior control of communications on the Internet, regardless of frontiers, should remain an exception;

Considering, furthermore, that there is a need to remove barriers to individual access to the Internet, and thus to complement measures already undertaken to set up public access points in line with Recommendation No. R (99) 14 on universal community service concerning new communication and information services;

Convinced that freedom to establish services provided through the Internet will contribute to guaranteeing the right of users to access pluralistic content from a variety of domestic and foreign sources;

Convinced also that it is necessary to limit the liability of service providers when they act as mere transmitters, or when they, in good faith, provide access to, or host, content from third parties;

Recalling in this respect Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);

Stressing that freedom of communication on the Internet should not prejudice the human dignity, human rights and fundamental freedoms of others, especially minors;

Considering that a balance has to be found between respecting the will of users of the Internet not to disclose their identity and the need for law enforcement authorities to trace those responsible for criminal acts;

Welcoming efforts by service providers to co-operate with law enforcement agencies when faced with illegal content on the Internet;

Noting the importance of co-operation between these agencies in the fight against such content,

Declare that they seek to abide by the following principles in the field of communication on the Internet:

Principle 1: Content rules for the Internet

Member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery.

Principle 2: Self-regulation or co-regulation

Member states should encourage self-regulation or co-regulation regarding content disseminated on the Internet.

Principle 3: Absence of prior state control

Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries.

Provided that the safeguards of Article 10, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms are respected, measures may be taken to enforce the removal of clearly identifiable Internet content or, alternatively, the blockage of access to it, if the competent national authorities have taken a provisional or final decision on its illegality.

Principle 4: Removal of barriers to the participation of individuals in the information society

Member states should foster and encourage access for all to Internet communication and information services on a non-discriminatory basis at an affordable price. Furthermore, the active participation of the public, for example by setting up and running individual websites, should not be subject to any licensing or other requirements having a similar effect.

Principle 5: Freedom to provide services via the Internet

The provision of services via the Internet should not be made subject to specific authorisation schemes on the sole grounds of the means of transmission used.

Member states should seek measures to promote a pluralistic offer of services via the Internet which caters to the different needs of users and social groups. Service providers should be allowed to operate in a regulatory framework which guarantees them non-discriminatory access to national and international telecommunication networks.

Principle 6: Limited liability of service providers for Internet content

Member states should not impose on service providers a general obligation to monitor content on the Internet to which they give access, that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.

Member states should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet.

In cases where the functions of service providers are wider and they store content emanating from other parties, member states may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware, as defined by national law, of their illegal nature or, in the event of a claim for damages, of facts or circumstances revealing the illegality of the activity or information.

When defining under national law the obligations of service providers as set out in the previous paragraph, due care must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information.

In all cases, the above-mentioned limitations of liability should not affect the possibility of issuing injunctions where service providers are required to terminate or prevent, to the extent possible, an infringement of the law.

Principle 7: Anonymity

In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, RECOMMENDATION REC(2004)16 ON THE RIGHT OF REPLY IN THE NEW MEDIA ENVIRONMENT

Adopted 15 December 2004

The Committee of Ministers, under the terms of Article 15b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and promoting the ideals and principles which are their common heritage;

Recalling its Resolution (74) 26 on the right of reply – position of the individual in relation to the press, the provisions of which should apply to all media;

Noting that, since the adoption of this Resolution, a number of major technological developments have taken place, necessitating a revision of this text in order to adapt it to the current situation of the media sector in Europe;

Recalling, furthermore, that the European Convention on Transfrontier Television (ETS No. 132) refers not only to the right of reply but also to other comparable legal or administrative remedies;

Reaffirming that the right of reply should protect any legal or natural person from any information presenting inaccurate facts concerning that person and affecting his or her rights, and considering consequently that the dissemination of opinions and ideas must remain outside the scope of this Recommendation;

Considering that the right of reply is a particularly appropriate remedy in the online environment due to the possibility of instant correction of contested information and the technical ease with which replies from concerned persons can be attached to it;

Considering that it is also in the interest of the public to receive information from different sources, thereby guaranteeing that they receive complete information;

Acknowledging that the right of reply can be assured not only through legislation, but also through co-regulatory or self-regulatory measures;

Emphasising that the right of reply is without prejudice to other remedies available to persons whose right to dignity, honour, reputation or privacy have been violated in the media,

Recommends that the governments of the member states should examine and, if necessary, introduce in their domestic law or practice a right of reply or any other equivalent remedy, which allows a rapid correction of incorrect information in online or off-line media along the lines of the following minimum principles, without prejudice to the possibility to adjust their exercise to the particularities of each type of media.

Definition

For the purposes of this Recommendation:

The term "medium" refers to any means of communication for the periodic dissemination to the public of edited information, whether online or off-line, such as newspapers, periodicals, radio, television and web-based news services.

Minimum principles

1. Scope of the right of reply

Any natural or legal person, irrespective of nationality or residence, should be given a right of reply or an equivalent remedy offering a possibility to react to any information in the media presenting inaccurate facts about him or her and which affect his/her personal rights.

2. Promptness

The request for a reply should be addressed to the medium concerned within a reasonably short time from the publication of the contested information. The medium in question should make the reply public without undue delay.

3. Prominence

The reply should be given, as far as possible, the same prominence as was given to the contested information in order for it to reach the same public and with the same impact.

4. Free of charge

The reply should be made public free of charge for the person concerned.

5. Exceptions

By way of exception, national law or practice may provide that the request for a reply may be refused by the medium in question in the following cases:

– if the length of the reply exceeds what is necessary to correct the contested information;

– if the reply is not limited to a correction of the facts challenged;

– if its publication would involve a punishable act, would render the content provider liable to civil law proceedings or would transgress standards of public decency;
– if it is considered contrary to the legally protected interests of a third party;
– if the individual concerned cannot show the existence of a legitimate interest;
– if the reply is in a language different from that in which the contested information was made public;
– if the contested information is a part of a truthful report on public sessions of the public authorities or the courts.

6. Safeguarding an effective exercise of the right of reply

In order to safeguard the effective exercise of the right of reply, the media should make public the name and contact details of the person to whom requests for a reply can be addressed.
For the same purpose, national law or practice should determine to what extent the media are obliged to conserve, for a reasonable length of time, a copy of information or programmes made publicly available or, at least, while a request for inserting a reply can be made, or while a dispute is pending before a tribunal or other competent body.

7. Electronic archives

If the contested information is kept publicly available in electronic archives and a right of reply has been granted, a link should be established between the two if possible, in order to draw the attention of the user to the fact that the original information has been subject to a response.

8. Settlement of disputes

If a medium refuses a request to make a reply public, or if the reply is not made public in a manner satisfactory for the person concerned, the possibility should exist for the latter to bring the dispute before a tribunal or another body with the power to order the publication of the reply.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, DECLARATION ON FREEDOM OF EXPRESSION AND INFORMATION IN THE MEDIA IN THE CONTEXT OF THE FIGHT AGAINST TERRORISM (2005)

Adopted 2 March 2005

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and promoting the ideals and principles which are their common heritage;
Considering the dramatic effect of terrorism on the full enjoyment of human rights, in particular the right to life, its threat to democracy, its aim notably to destabilise legitimately constituted governments and to undermine pluralistic civil society and its challenge to the ideals of everyone to live free from fear;
Unequivocally condemning all acts of terrorism as criminal and unjustifiable, wherever and by whomever committed;
Noting that every state has the duty to protect human rights and fundamental freedoms of all persons;
Recalling its firm attachment to the principles of freedom of expression and information as a basic element of democratic and pluralist society and a prerequisite for the progress of society and for the development of human beings, as underlined in the case-law of the European Court of Human Rights under Article 10 of the European Convention on Human Rights as well as in the Committee of Ministers' Declaration on the freedom of expression and information of 1982;
Considering that the free and unhindered dissemination of information and ideas is one of the most effective means of promoting understanding and tolerance, which can help prevent or combat terrorism;
Recalling that states cannot adopt measures which would impose restrictions on freedom of expression and information going beyond what is permitted by Article 10 of the European Convention on Human Rights, unless under the strict conditions laid down in Article 15 of the Convention;
Recalling furthermore that in their fight against terrorism, states must take care not to adopt measures that are contrary to human rights and fundamental freedoms, including the freedom of expression, which is one of the very pillars of the democratic societies that terrorists seek to destroy;

Noting the value which self-regulatory measures taken by the media may have in the particular context of the fight against terrorism;

Recalling Article 10 of the European Convention on Human Rights, the Committee of Ministers' Declarations on the freedom of expression and information adopted on 29 April 1982, on the protection of journalists in situations of conflict and tension adopted on 3 May 1996, and its Recommendations No. R (97) 20 on hate speech, No. R (97) 21 on the media and the promotion of a culture of tolerance, No. R (2000) 7 on the right of journalists not to disclose their sources of information and Rec(2003)13 on the provision of information through the media in relation to criminal proceedings;

Bearing in mind the Resolutions and Recommendations of the Parliamentary Assembly on terrorism;

Recalling the Guidelines on Human Rights and the Fight against Terrorism which it adopted on 11 July 2002,

***Calls on public authorities in member states*:**

- not to introduce any new restrictions on freedom of expression and information in the media unless strictly necessary and proportionate in a democratic society and after examining carefully whether existing laws or other measures are not already sufficient;

- to refrain from adopting measures equating media reporting on terrorism with support for terrorism;

- to ensure access by journalists to information regularly updated, in particular by appointing spokespersons and organising press conferences, in accordance with national legislation;

- to provide appropriate information to the media with due respect for the principle of the presumption of innocence and the right to respect for private life;

- to refrain from creating obstacles for media professionals in having access to scenes of terrorist acts that are not imposed by the need to protect the safety of victims of terrorism or of law enforcement forces involved in an on-going anti-terrorist operation, of the investigation or the effectiveness of safety or security measures; in all cases where the authorities decide to restrict such access, they should explain the reasons for the restriction and its duration should be proportionate to the circumstances and a person authorised by the authorities should provide information to journalists until the restriction has been lifted;

- to guarantee the right of the media to know the charges brought by the judicial authorities against persons who are the subject of anti-terrorist judicial proceedings, as well as the right to follow these proceedings and to report on them, in accordance with national legislation and with due respect for the presumption of innocence and for private life; these rights may only be restricted when prescribed by law where their exercise is likely to prejudice the secrecy of investigations and police inquiries or to delay or impede the outcome of the proceedings and without prejudice to the exceptions mentioned in Article 6 paragraph 1 of the European Convention on Human Rights;

- to guarantee the right of the media to report on the enforcement of sentences, without prejudice to the right to respect for private life;

- to respect, in accordance with Article 10 of the European Convention on Human Rights and with Recommendation No. R (2000) 7, the right of journalists not to disclose their sources of information; the fight against terrorism does not allow the authorities to circumvent this right by going beyond what is permitted by these texts;

- to respect strictly the editorial independence of the media, and accordingly, to refrain from any kind of pressure on them;

- to encourage the training of journalists and other media professionals regarding their protection and safety and to take, where appropriate and, if circumstances permit, with their agreement, measures to protect journalists or other media professionals who are threatened by terrorists;

***Invites the media and journalists to consider the following suggestions*:**

- to bear in mind their particular responsibilities in the context of terrorism in order not to contribute to the aims of terrorists; they should, in particular, take care not to add to the feeling of fear that terrorist acts can create, and not to offer a platform to terrorists by giving them disproportionate attention;

- to adopt self-regulatory measures, where they do not exist, or adapt existing measures so that they can effectively respond to ethical issues raised by media reporting on terrorism, and implement them;

- to refrain from any self-censorship, the effect of which would be to deprive the public of information necessary for the formation of its opinion;

- to bear in mind the significant role which they can play in preventing "hate speech" and incite-

ment to violence, as well as in promoting mutual understanding;

- to be aware of the risk that the media and journalists can unintentionally serve as a vehicle for the expression of racist or xenophobic feelings or hatred;

- to refrain from jeopardising the safety of persons and the conduct of antiterrorist operations or judicial investigations of terrorism through the information they disseminate;

- to respect the dignity, the safety and the anonymity of victims of terrorist acts and of their families, as well as their right to respect for private life, as guaranteed by Article 8 of the European Convention on Human Rights;

- to respect the right to the presumption of innocence of persons who are prosecuted in the context of the fight against terrorism;

- to bear in mind the importance of distinguishing between suspected or convicted terrorists and the group (national, ethnic, religious or ideological) to which they belong or to which they claim to subscribe;

- to assess the way in which they inform the public of questions concerning terrorism, in particular by consulting the public, by analytical broadcasts, articles and colloquies, and to inform the public of the results of this assessment;

- to set up training courses, in collaboration with their professional organisations, for journalists and other media professionals who report on terrorism, on their safety and the historical, cultural, religious and geopolitical context of the scenes they cover, and to invite journalists to follow these courses.

The Committee of Ministers agrees to monitor, within the framework of the existing procedures, the initiatives taken by governments of member states aiming at reinforcing measures, in particular in the legal field, to fight terrorism as far as they could affect the freedom of the media, and invites the Parliamentary Assembly to do alike.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, DECLARATION (2005)56 ON HUMAN RIGHTS AND THE RULE OF LAW IN THE INFORMATION SOCIETY

Adopted 13 May 2005

The member states of the Council of Europe,

Recalling their commitment to building societies based on the values of human rights, democracy, rule of law, social cohesion, respect for cultural diversity and trust between individuals and between peoples, and their determination to continue honouring this commitment as their countries enter the Information Age;

Respecting the obligations and commitments as undertaken within existing Council of Europe standards and other documents;

Recognising that information and communication technologies (ICTs) are a driving force in building the Information Society and have brought about a convergence of different communication mediums;

Considering the positive contribution the deployment of ICTs makes to economic growth and prosperity as well as labour productivity;

Aware of the profound impact, both positive and negative, that ICTs have on many aspects of human rights;

Aware, in particular, that ICTs have the potential to bring about changes to the social, technological and legal environment in which current human rights instruments were originally developed;

Aware that ICTs are increasingly becoming an integral part of the democratic process;

Recognising that ICTs can offer a wider range of possibilities in exercising human rights;

Recognising therefore that limited or no access to ICTs can deprive individuals of the ability to exercise fully their human rights;

Reaffirming that all rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) remain fully valid in the Information Age and should continue to be protected regardless of new technological developments;

Recognising the need to take into account in national legislation new ICT-assisted forms of human rights violations and the fact that ICTs can greatly intensify the impact of such violations;

Conclude that, to better respond to the new challenges of protecting human rights in a rapidly evolving Information Society, member states need to review and, where necessary, adjust the application of human rights instruments;

Undertake to adopt policies for the further development of the Information Society which are compliant with the ECHR and the case-law

of the European Court of Human Rights, and which aim to preserve, and whenever possible enhance, democracy, to protect human rights, in particular freedom of expression and information, and to promote respect for the rule of law;

Declare that when circumstances lead to the adoption of measures to curtail the exercise of human rights in the Information Society, in the context of law enforcement or the fight against terrorism, such measures shall comply fully with international human rights standards. These measures must be lawful and defined as precisely as possible, be necessary and proportionate to the aim pursued, and be subject to supervision by an independent authority or judicial review. Further, when such measures fall under the scope of Article 15 of the ECHR, they need to be reassessed on a regular basis with the purpose of lifting them when the circumstances under which they were adopted no longer exist;

Declare that the exercise of the rights and freedoms enshrined in the ECHR shall be secured for all without discrimination, regardless of the technical means employed;

Declare that they seek to abide by the principles and guidelines regarding respect for human rights and the rule of law in the Information Society, found in section I below;

Invite civil society, the private sector and other interested stakeholders to take into account in their work towards an inclusive Information Society for all, the considerations in section II below;

Invite the Chair of the Committee of Ministers to submit this Declaration, as a Council of Europe contribution, to the Tunis Phase of the World Summit on the Information Society (WSIS) for consideration.

I. Human rights in the Information Society

1. The right to freedom of expression, information and communication

ICTs provide unprecedented opportunities for all to enjoy freedom of expression. However, ICTs also pose many serious challenges to that freedom, such as state and private censorship.

Freedom of expression, information and communication should be respected in a digital as well as in a non-digital environment, and should not be subject to restrictions other than those provided for in Article 10 of the ECHR, simply because communication is carried in digital form.

In guaranteeing freedom of expression, member states should ensure that national legislation to combat illegal content, for example racism, racial discrimination and child pornography, applies equally to offences committed via ICTs.

Member states should maintain and enhance legal and practical measures to prevent state and private censorship. At the same time, member states should ensure compliance with the Additional Protocol to the Convention on Cybercrime and other relevant conventions which criminalise acts of a racist and xenophobic nature committed through computer systems. In that context, member states should promote frameworks for self- and co-regulation by private sector actors (such as the ICT industry, Internet service providers, software manufacturers, content providers and the International Chamber of Commerce). Such frameworks would ensure the protection of freedom of expression and communication.

Member states should promote, through appropriate means, interoperable technical standards in the digital environment, including those for digital broadcasting, that allow citizens the widest possible access to content.

2. The right to respect for private life and correspondence

The large-scale use of personal data, which includes electronic processing, collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, disclosure by transmission or otherwise, has improved the efficiency of governments and the private sector. Moreover, ICTs, such as Privacy Enhancing Technology (PETs), can be used to protect privacy. Nevertheless, such advances in technology pose serious threats to the right to private life and private correspondence.

Any use of ICTs should respect the right to private life and private correspondence. The latter should not be subject to restrictions other than those provided for in Article 8 of the ECHR, simply because it is carried in digital form. Both the content and traffic data of electronic communications fall under the scope of Article 8 of the ECHR and should not be submitted to restrictions other than those provided for in that provision. Any automatic processing of personal data falls under the scope of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and should respect the provisions of that instrument.

Member states should promote frameworks for self- and co-regulation by private sector actors with a view to protecting the right to respect for private life and private correspondence. A key

element of the promotion of such self- or co-regulation should be that any processing of personal data by governments or the private sector should be compatible with the right to respect for private life, and that no exception should exceed those provided for in Article 8, paragraph 2, of the ECHR, or in Article 9, paragraph 2, of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

3. The right to education and the importance of encouraging access to the new information technologies and their use by all without discrimination

New forms of access to information will stimulate wider dissemination of information regarding social, economic and cultural aspects of life, and can bring about greater inclusion and overcome forms of discrimination. E-learning has a great potential for promoting democratic citizenship through education and enhancing the level of people's knowledge throughout the world. At the same time, there is a serious risk of exclusion for the "computer illiterate" and for those without adequate access to information technologies for social, economic or cultural reasons.

Computer literacy is a fundamental prerequisite for access to information, the exercise of cultural rights and the right to education through ICTs. Any regulatory measure on the media and new communication services should respect and, wherever possible, promote the fundamental values of pluralism, cultural and linguistic diversity, and non-discriminatory access to different means of communication.

Member states should facilitate access to ICT devices and promote education to allow all persons, in particular children, to acquire the skills needed to work with a broad range of ICTs and assess critically the quality of information, in particular that which would be harmful to them.

4. The prohibition of slavery and forced labour, and the prohibition of trafficking in human beings

The use of ICTs has expanded the possibilities for trafficking in human beings and has created a new virtual form of this practice.

In a digital environment, such as the Internet, when trafficking in human beings contravenes Article 4 of the ECHR, it should be treated in the same manner as in a non-digital environment.

Member states should maintain and enhance legal and practical measures to prevent and combat ICT-assisted forms of trafficking in human beings.

5. The right to a fair trial and to no punishment without law

ICTs facilitate access to legal material and knowledge. Moreover, public transmission of court proceedings and transparency of information regarding trials facilitates better public scrutiny of court proceedings. Trials can be conducted more efficiently by using ICT-facilities. However, given the speed of ICT-driven communication and the resulting wide-ranging impact, ICTs can greatly intensify pre-trial publicity and influence witnesses and public opinion before and during a trial. Moreover, ICTs allow crimes not covered by legal frameworks, which may hinder combating infringements of human rights. The global reach of ICTs, in particular the Internet, can create problems of jurisdiction and also raise issues on the ability to apply legal frameworks to instances of human rights violation.

In the determination of their civil rights and obligations or any criminal charge against them, everyone is entitled, in conformity with Article 6 of the ECHR, to identical protection in a digital environment, such as the Internet, to that which they would receive in a non-digital environment. The right of no punishment without law applies equally to a digital and a non-digital environment.

Member states should promote codes of conduct for representatives of the media and information service providers, which stress that media reporting on trials should be in conformity with the prescriptions of Article 6 of the ECHR. They should also consider whether there is a need to develop further international legal frameworks on jurisdiction to ensure that the right to no punishment without law is respected in a digital environment.

6. The protection of property

In the ICT environment, the protection of property refers mainly to intellectual property, such as patents, trademarks and copyrights. ICTs provide unprecedented access to material covered by intellectual property rights and opportunities for its exploitation. However, ICTs can facilitate the abuse of intellectual property rights and hinder the prosecution of offenders, due to the speed of technology changes, the low cost of dissemination of content, the volume of infringement, the difficulty in tracking offences across international borders and the decentralised nature of file

sharing. Innovation and creativity would be discouraged and investment diminished without effective means of enforcing intellectual property rights.
Intellectual property rights must be protected in a digital environment, in accordance with the provisions of international treaties in the area of intellectual property. At the same time, access to information in the public domain must be protected, and attempts to curtail access and usage rights prevented.
Member states should provide the legal framework necessary for the above-mentioned goals. They should also seek, where possible, to put the political, social services, economic, and research information they produce into the public domain, thereby increasing access to information of vital importance to everyone. In so doing, they should take note of the Council of Europe's Convention on Cybercrime, in particular Article 10, on offences related to infringements of copyright and related rights.

7. The right to free elections

ICTs have the potential, if appropriately used, to strengthen representative democracy by making it easier to hold elections and public consultations which are accessible to all, raise the quality of public deliberation, and enable citizens and civil society to take an active part in policy making at national, regional and local levels. ICTs can make all public services more efficient, responsive, transparent and accountable. At the same time, improper use of ICTs may subvert the principles of universal, equal, free and secret suffrage, as well as create security and reliability problems with regard to some e-voting systems.

E-voting should respect the principles of democratic elections and referendums and be at least as reliable and secure as democratic elections and referendums which do not involve the use of electronic means.

Member states should examine the use of ICTs in fostering democratic processes with a view to strengthening the participation, initiative, knowledge and engagement of citizens, improving the transparency of democratic decision making, the accountability and responsiveness of public authorities, and encouraging public debate and scrutiny of the decision-making process. Where member states use e-voting, they shall take steps to ensure transparency, verifiability and accountability, reliability and security of the e-voting systems, and in general ensure their compatibility with Committee of Ministers' Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting.

8. Freedom of assembly

ICTs bring an additional dimension to the exercise of freedom of assembly and association, thus extending and enriching ways of enjoying these rights in a digital environment. This has crucial implications for the strengthening of civil society, for participation in the associative life at work (trade unions and professional bodies) and in the political sphere, and for the democratic process in general. At the same time, ICTs provide extensive means of monitoring and surveillance of assembly and association in a digital environment, as well as the ability to erect electronic barriers, severely restricting the exercise of these rights.
All groups in society should have the freedom to participate in ICT-assisted associative life as this contributes to the development of a vibrant civil society. This freedom should be respected in a digital environment, such as the Internet, as well as in a non-digital one and should not be subject to restrictions other than those provided for in Article 11 of the ECHR, simply because assembly takes place in digital form.
Member states should adapt their legal frameworks to guarantee freedom of ICT-assisted assembly and take the steps necessary to ensure that monitoring and surveillance of assembly and association in a digital environment does not take place, and that any exceptions to this must comply with those provided for in Article 11, paragraph 2, of the ECHR.

II. A multi-stakeholder governance approach for building the Information Society: the roles and responsibilities of stakeholders

Building an inclusive Information Society, based on respect for human rights and the rule of law, requires new forms of solidarity, partnership and cooperation among governments, civil society, the private sector and international organisations. Through open discussions and exchanges of information worldwide, a
multi-stakeholder governance approach will help shape agendas and devise new regulatory and non-regulatory models which will account for challenges and problems arising from the rapid development of the Information Society.

1. Council of Europe member states

Council of Europe member states should promote the opportunities afforded by ICTs for fuller enjoyment of human rights and counteract the

threats they pose in this respect, while fully complying with the ECHR. The primary objective of all measures taken should be to extend the benefits of ICTs to everyone, thus encouraging inclusion in the Information Society. This can be done by ensuring effective and equitable access to ICTs, and developing the skills and knowledge necessary to exploit this access, including media education.

The exercise of human rights should be subject to no restrictions other than those provided for in the ECHR or the case law of the European Court of Human Rights, simply because it is conducted in a digital environment. At the same time, determined efforts should be undertaken to protect individuals against new and intensified forms of human rights violations through the use of the ICTs.

Taking full account of the differences between services delivered by different means and people's expectations of these services, member states, with a view to protecting human rights, should promote self- and co-regulation by private sector actors to reduce the availability of illegal and of harmful content and to enable users to protect themselves from both.

2. Civil society

Civil society actors have been and always will be instrumental in shaping the society in which they live, and the Information Society is no exception. To successfully build an Information Society which complies with the standards defined by the ECHR requires the full participation of civil society in both determining strategies and implementing them. Civil society can contribute to developing a common vision for maximising the benefits of ICTs for all and provide its own input into future common regulatory measures that will best promote human rights.

At the Council of Europe, one major channel of civil society input is the Conference of International

Non-governmental Organisations (INGOs).

In addition, civil society, in partnership with governments and the business sector, is invited to preserve and enhance its role of drawing attention to and combating the abuse and misuse of ICTs, which are detrimental to both individuals and democratic society in general.

At a trans-national level, civil society is urged to cooperate in the sharing of objectives, best practice and experience with respect to expanding the opportunities held by the Information Society.

3. Private sector

Private sector actors are urged to play a role in upholding and promoting human rights, such as freedom of expression and the respect of human dignity. This role can be fulfilled most effectively in partnership with governments and civil society.

In cooperation with governments and civil society, private sectors actors are urged to take measures to prevent and counteract threats, risks and limitations to human rights posed by the misuse of ICTs or their use for illegal purposes, and to promote e-inclusion. In addition, they are invited to establish and further broaden the scope of codes of conduct and other forms of self-regulation for the promotion of human rights through ICTs.

Private sector actors are also invited to initiate and develop self- and co-regulatory measures on the right to private life and private correspondence, as well as on the issue of upholding freedom of expression and communication.

Self- and co-regulatory measures with regard to private life and private correspondence should emphasise in particular that any processing of personal data should comply with the right to private life. Against this background, private sector actors should pay particular attention to, *inter alia*, the following current issues:

- the collection, processing and monitoring of traffic data;
- the monitoring of private correspondence via e-mail or other forms of electronic communication;
- the right to privacy in the work place;
- camera observation;
- biometric identification;
- malware, including spam;
- the collection and use of genetic data and genetic testing.

With regard to self- and co-regulatory measures which aim to uphold freedom of expression and communication, private sector actors are encouraged to address in a decisive manner the following issues:

- hate speech, racism and xenophobia and incitation to violence in a digital environment such as the Internet;
- private censorship (hidden censorship) by Internet service providers, for example blocking or removing content, on their own initiative or upon the request of a third party;
- the difference between illegal content and harmful content.

Finally, private sector actors are urged to participate in the combat against virtual trafficking of

child pornography images and virtual trafficking of human beings.

4. The Council of Europe

The Council of Europe will raise awareness of and promote accession to the Convention on Cybercrime and its Additional Protocol, and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, on a worldwide basis. The Convention Committee will monitor the implementation of these conventions and their additional protocols and will, if need be, propose any amendments.

In accordance with the Action Plan adopted by the 7th European Ministerial Conference on Mass Media Policy (Kiev, 10-11 March 2005), the Steering Committee on the Media and New Communications Services (CDMC) will:

- take any necessary initiatives, including the preparation of guidelines, *inter alia*, on the roles and responsibilities of intermediaries and other Internet actors in ensuring freedom of expression and communication;

- promote the adoption by member states of measures to ensure, at the pan-European level, a coherent level of protection for minors against harmful content in traditional and new electronic media, while securing freedom of expression and the free flow of information;

- establish a regular pan-European forum to exchange information and best practice between member states and other stakeholders on measures to promote inclusion in the Information Society;

- monitor the impact of the development of new communication and information services on the protection of copyright and neighbouring rights, so as to take any initiative which might prove necessary to secure this protection.

The objectives of the project "Good governance in the Information Society" will be further defined, taking into account the Council of Europe's work in the fields of e-voting and e-governance, and in particular its achievements represented by Committee of Ministers' Recommendation *Rec(2004)11* on legal, operational and technical standards for e-voting, and Recommendation *Rec(2004)15* on electronic governance ("e-governance").

The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD) will look into the application of data protection principles to worldwide telecommunication networks.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, RECOMMENDATION CM/REC(2007)3 ON THE REMIT OF PUBLIC SERVICE MEDIA IN THE INFORMATION SOCIETY

Adopted 31 January 2007

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles that are their common heritage;

Recalling the commitment of member states to the fundamental right to freedom of expression and information, as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Recalling the importance for democratic societies of a wide variety of independent and autonomous media, able to reflect the diversity of ideas and opinions, and that new information and communication techniques and services must be effectively used to broaden the scope of freedom of expression, as stated in its Declaration on the freedom of expression and information (April 1982);

Bearing in mind Resolution No. 1 on the future of public service broadcasting adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, December 1994);

Recalling its Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting and its Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting, as well as its Declaration on the guarantee of the independence of public service broadcasting in the member states (September 2006);

Recalling Recommendation 1641 (2004) of the Parliamentary Assembly of the Council of Europe on public service broadcasting, calling

for the adoption of a new major policy document on public service broadcasting taking stock of recent technological developments, as well as the report on public service broadcasting by the Parliamentary Assembly's Committee on Culture, Science and Education (Doc. 10029, January 2004), noting the need for the evolution and modernisation of this sector, and the positive reply of the Committee of Ministers to this recommendation;

Bearing in mind the political documents adopted at the 7th European Ministerial Conference on Mass Media Policy (Kyiv, March 2005) and, more particularly, the objective set out in the Action Plan to examine how the public service remit should, as appropriate, be developed and adapted by member states to suit the new digital environment;

Recalling the UNESCO Convention on the protection and promotion of the diversity of cultural expressions (October 2005), which attaches considerable importance to, *inter alia*, the creation of conditions conducive to diversity of the media including through public service broadcasting;

Conscious of the need to safeguard the fundamental objectives of the public interest in the information society, including freedom of expression and access to information, media pluralism, cultural diversity, and the protection of minors and human dignity, in conformity with the Council of Europe standards and norms;

Underlining the specific role of public service broadcasting, which is to promote the values of democratic societies, in particular respect for human rights, cultures and political pluralism; and with regard to its goal of offering a wide choice of programmes and services to all sectors of the public, promoting social cohesion, cultural diversity and pluralist communication accessible to everyone;

Mindful of the fact that growing competition in broadcasting makes it more difficult for many commercial broadcasters to maintain the public value of their programming, especially in their free-to-air services;

Conscious of the fact that globalisation and international integration, as well as the growing horizontal and vertical concentration of privately-owned media at the national and international levels, have far-reaching effects for states and their media systems;

Noting that in the information society, the public, and especially the younger generations, more and more often turn to the new communication services for content and for the satisfaction of their communication needs, at the expense of traditional media;

Convinced therefore that the public service remit is all the more relevant in the information society and that it can be discharged by public service organisations via diverse platforms and an offer of various services, resulting in the emergence of public service media, which, for the purpose of this recommendation, does not include print media;

Recognising the continued full legitimacy and the specific objectives of public service media in the information society;

Persuaded that, while paying attention to market and competition questions, the common interest requires that public service media be provided with adequate funds for the fulfilment of the public service remit as conferred on them;

Recognising the right of member states to define the remits of individual public service media in accordance with their own national circumstances;

Acknowledging that the remits of individual public service media may vary within each member state, and that these remits may not necessarily include all the principles set out in this recommendation,

Recommends that the governments of member states:

i. guarantee the fundamental role of the public service media in the new digital environment, setting a clear remit for public service media, and enabling them to use new technical means to better fulfil this remit and adapt to rapid changes in the current media and technological landscape, and to changes in the viewing and listening patterns and expectations of the audience;

ii. include, where they have not already done so, provisions in their legislation/regulations specific to the remit of public service media, covering in particular the new communication services, thereby enabling public service media to make full use of their potential and especially to promote broader democratic, social and cultural participation, *inter alia*, with the help of new interactive technologies;

iii. guarantee public service media, via a secure and appropriate financing and organisational framework, the conditions required to carry out the function entrusted to them by member states in the new digital environment, in a transparent and accountable manner;

iv. enable public service media to respond fully and effectively to the challenges of the information society, respecting the public/private dual

structure of the European electronic media landscape and paying attention to market and competition questions;

v. ensure that universal access to public service media is offered to all individuals and social groups, including minority and disadvantaged groups, through a range of technological means;

vi. disseminate widely this recommendation and, in particular, bring to the attention of public authorities, public service media, professional groups and the public at large, the guiding principles set out below, and ensure that the necessary conditions are in place for these principles to be put into practice.

Guiding principles concerning the remit of public service media in the information society

I. The public service remit: maintaining the key elements

1. Member states have the competence to define and assign a public service remit to one or more specific media organisations, in the public and/or private sector, maintaining the key elements underpinning the traditional public service remit, while adjusting it to new circumstances. This remit should be performed with the use of state-of-the-art technology appropriate for the purpose. These elements have been referred to on several occasions in Council of Europe documents, which have defined public service broadcasting as, amongst other things:

a) a reference point for all members of the public, offering universal access;

b) a factor for social cohesion and integration of all individuals, groups and communities;

c) a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards;

d) a forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals;

e) an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage.

2. In the information society, relying heavily on digital technologies, where the means of content distribution have diversified beyond traditional broadcasting, member states should ensure that the public service remit is extended to cover provision of appropriate content also via new communication platforms.

II. Adapting the public service remit to the information society

a. A reference point for all members of the public, with universal access offered

3. Public service media should offer news, information, educational, cultural, sports and entertainment programmes and content aimed at the various categories of the public and which, taken as a whole, constitute an added public value compared to those of other broadcasters and content providers.

4. The principle of universality, which is fundamental to public service media, should be addressed having regard to technical, social and content aspects. Member states should, in particular, ensure that public service media can be present on significant platforms and have the necessary resources for this purpose.

5. In view of changing user habits, public service media should be able to offer both generalist and specialised contents and services, as well as personalised interactive and on-demand services. They should address all generations, but especially involve the younger generation in active forms of communication, encouraging the provision of user-generated content and establishing other participatory schemes.

6. Member states should see to it that the goals and means for achievement of these goals by public service media are clearly defined, in particular regarding the use of thematic services and new communication services. This may include regular evaluation and review of such activities by the relevant bodies, so as to ensure that all groups in the audience are adequately served.

b. A factor for social cohesion and integration of all individuals, groups and communities

7. Public service media should be adapted to the new digital environment to enable them to fulfil their remit in promoting social cohesion at local, regional, national and international levels, and to foster a sense of co-responsibility of the public for the achievement of this objective.

8. Public service media should integrate all communities, social groups and generations, including minority groups, young people, old persons, the most disadvantaged social categories, persons with disabilities, while respecting their different identities and needs. In this context, attention should be paid to the content created by and for such groups, and to their access to, and presence and portrayal in, public service

media. Due attention should be also paid to gender equality issues.

9. Public service media should act as a trusted guide of society, bringing concretely useful knowledge into the life of individuals and of different communities in society. In this context, they should pay particular attention to the needs of minority groups and underprivileged and disadvantaged social categories. This role of filling a gap in the market, which is an important part of the traditional public service media remit, should be maintained in the new digital environment.

10. In an era of globalisation, migration and integration at European and international levels, the public service media should promote better understanding among peoples and contribute to intercultural and inter-religious dialogue.

11. Public service media should promote digital inclusion and efforts to bridge the digital divide by, inter alia, enhancing the accessibility of programmes and services on new platforms.

c. A source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards

12. Member states should ensure that public service media constitute a space of credibility and reliability among a profusion of digital media, fulfilling their role as an impartial and independent source of information, opinion and comment, and of a wide range of programming and services, satisfying high ethical and quality standards.

13. When assigning the public service remit, member states should take account of the public service media's role in bridging fragmentation, reducing social and political alienation and promoting the development of civil society. A requirement for this is the independent and impartial news and current affairs content, which should be provided on both traditional programmes and new communication services.

d. A forum for public discussion and a means of promoting broader democratic participation of individuals

14. Public service media should play an important role in promoting broader democratic debate and participation, with the assistance, among other things, of new interactive technologies, offering the public greater involvement in the democratic process. Public service media should fulfil a vital role in educating active and responsible citizens, providing not only quality content but also a forum for public debate, open to diverse ideas and convictions in society, and a platform for disseminating democratic values.

15. Public service media should provide adequate information about the democratic system and democratic procedures, and should encourage participation not only in elections but also in decision-making processes and public life in general. Accordingly, one of the public service media's roles should be to foster citizens' interest in public affairs and encourage them to play a more active part.

16. Public service media should also actively promote a culture of tolerance and mutual understanding by using new digital and online technologies.

17. Public service media should play a leading role in public scrutiny of national governments and international governmental organisations, enhancing their transparency, accountability to the public and legitimacy, helping eliminate any democratic deficit, and contributing to the development of a European public sphere.

18. Public service media should enhance their dialogue with, and accountability to, the general public, also with the help of new interactive services.

e. An active contributor to audiovisual creation and production and to a greater appreciation and dissemination of the diversity of national and European cultural heritage

19. Public service media should play a particular role in the promotion of cultural diversity and identity, including through new communication services and platforms. To this end, public service media should continue to invest in new, original content production, made in formats suitable for the new communication services. They should support the creation and production of domestic audiovisual works reflecting as well local and regional characteristics.

20. Public service media should stimulate creativity and reflect the diversity of cultural activities, through their cultural programmes, in fields such as music, arts and theatre, and they should, where appropriate, support cultural events and performances.

21. Public service media should continue to play a central role in education, media literacy and life-long learning, and should actively contribute to the formation of knowledge-based society. Public service media should pursue this task, taking full advantage of the new opportunities and including all social groups and generations.

22. Public service media should play a particular role in preservation of cultural heritage. They should rely on and develop their archives, which should be digitised, thus being preserved for future generations. In order to be accessible to a broader audience, the audiovisual archives should, where appropriate and feasible, be accessible online. Member states should consider possible options to facilitate the accomplishment of such projects.

23. In their programming and content, public service media should reflect the increasingly multi-ethnic and multicultural societies in which they operate, protecting the cultural heritage of different minorities and communities, providing possibilities for cultural expression and exchange, and promoting closer integration, without obliterating cultural diversity at the national level.

24. Public service media should promote respect for cultural diversity, while simultaneously introducing the audience to the cultures of other peoples around the world.

III. The appropriate conditions required to fulfil the public service remit in the information society

25. Member states should ensure that the specific legal, technical, financial and organisational conditions required to fulfil the public service remit continue to apply in, and are adapted to, the new digital environment. Taking into account the challenges of the information society, member states should be free to organise their own national systems of public service media, suited to the rapidly changing technological and social realities, while at the same time remaining faithful to the fundamental principles of public service.

a. Legal conditions

26. Member states should establish a clear legal framework for the development of public service media and the fulfilment of their remit. They should incorporate into their legislation provisions enabling public service media to exercise, as effectively as possible, their specific function in the information society and, in particular, allowing them to develop new communication services.

27. To reconcile the need for a clear definition of the remit with the need to respect editorial independence and programme autonomy and to allow for flexibility to adapt public service activities rapidly to new developments, member states should find appropriate solutions, involving, if needed, the public service media, in line with their legal traditions.

b. Technical conditions

28. Member states should ensure that public service media have the necessary technical resources to fulfil their function in the information society. Developing a range of new services would enable them to reach more households, to produce more quality contents, responding to the expectations of the public, and to keep pace with developments in the digital environment. Public service media should play an active role in the technological innovation of the electronic media, as well as in the digital switchover.

c. Financial conditions

29. Member states should secure adequate financing for public service media, enabling them to fulfil their role in the information society, as defined in their remit. Traditional funding models relying on sources such as licence fees, the state budget and advertising remain valid under the new conditions.

30. Taking into account the developments of the new digital technology, member states may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, member states may consider allowing public service media to collect remunerations. Member states may also take advantage of public and community initiatives for the creation and financing of new types of public service media. However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society. When developing new funding systems, member states should pay due attention to the nature of the content provided in the interest of the public and in the common interest.

d. Organisational conditions

31. Member states should establish the organisational conditions for public service media that provide the most appropriate background for the delivery of the public service remit in the digital environment. In doing so they should pay due attention to the guarantee of the editorial independence and institutional autonomy of public service media and the particularities of their national media systems, as well as organisational changes needed to take advantage of new produc-

tion and distribution methods in the digital environment.
32. Member states should ensure that public service media organisations have the capacity and critical mass to operate successfully in the new digital environment, fulfil an extended public service remit and maintain their position in a highly concentrated market.
33. In organising the delivery of the public service remit, member states should make sure that public service media can, as necessary, engage in co-operation with other economic actors, such as commercial media, rights holders, producers of audiovisual content, platform operators and distributors of audiovisual media content.

COUNCIL OF EUROPE - PARLIAMENTARY ASSEMBLY, RECOMMENDATION 1804 (2007) ON STATE, RELIGION, SECULARITY AND HUMAN RIGHTS

Adopted on 29 June 2007

1. The Parliamentary Assembly notes that religion is an important feature of European society. This is because of the historic fact that certain religions have been present for centuries and because of their influence in Europe's history. Religions are still multiplying in our continent today, with a wide variety of churches and beliefs.
2. Organised religions as such are part and parcel of society and must be considered as institutions set up by and involving citizens who have the right to freedom of religion but also as organisations that are part of civil society, with all its potential for providing guidance on ethical and civic issues, which have a role to play in the national community, be it religious or secular.
3. The Council of Europe must recognise this state of affairs and welcome and respect religion, in all its plurality, as a form of ethical, moral, ideological and spiritual expression on the part of European citizens, taking account of the differences between the religions themselves and the circumstances in the country concerned.
4. The Assembly reaffirms that one of Europe's shared values, transcending national differences, is the separation of church and state. This is a generally accepted principle that prevails in politics and institutions in democratic countries. In Recommendation 1720 (2005) on education and religion, for instance, the Assembly noted that "each person's religion, including the option of having no religion, is a strictly personal matter".
5. The Assembly notes that, while protecting freedom of expression and freedom of religion, the European Court of Human Rights recognises the right of individual countries to organise and enact legislation regarding the relationship between the State and the church in compliance with the provisions of the European Convention on Human Rights, and notes that the Council of Europe member states today show situations with a varying degree of separation between government and religious institutions in full compliance with the European Convention on Human Rights and Fundamental Freedoms.
6. Over the last twenty years, religious worship has declined markedly in Europe. Fewer than one European in five attends a religious service at least once a week, whereas twenty years ago the figure was more than twice that. At the same time, we are witnessing the growing strength of the Muslim communities in virtually all the Council of Europe member states.
7. As a result of globalisation and the rapid development of new information and communication technology, some groups are particularly visible. What is undeniable, however, is that religion has, in recent years, again become a central issue of debate in our societies. Roman Catholics, members of the Orthodox Church, Evangelists and Muslims seem to be the most active here.
8. The Assembly recognises the importance of intercultural dialogue and its religious dimension and is willing to help devise a comprehensive Council of Europe strategy in this area. It considers, however, in the light of the principle of the separation of church and state, that interreligious and interdenominational dialogue is not a matter for states or for the Council of Europe.
9. In Recommendation 1396 (1999) on religion and democracy, the Assembly stated that there was "a religious aspect to many of the problems contemporary society [faced], such as... fundamentalist movements and terrorist acts, racism and xenophobia, and ethnic conflicts". This affirmation is as relevant as ever.
10. Governance and religion should not mix. Religion and democracy are not incompatible, however, and sometimes religions play a highly beneficial social role. By addressing the prob-

lems facing society, the civil authorities can, with the support of religions, eliminate much of what breeds religious extremism, but not everything.

11. Governments should take account of the special capacity of religious communities to foster peace, co-operation, tolerance, solidarity, intercultural dialogue and the dissemination of the values upheld by the Council of Europe.

12. Education is the key to combating ignorance, stereotypes and misunderstanding of religions and their leaders, and plays a central role in forging a democratic society.

13. Schools are an essential forum for intercultural dialogue and also lay the foundations of tolerant behaviour; they can effectively combat fanaticism by teaching children the history and philosophy of the main religions with restraint and objectivity. The media and families can also play an important part here.

14. A knowledge of religions is an integral part of knowledge of human history and civilisations. It is different from belief in, and worship of, a particular religion. Even countries where one religion prevails have a duty to teach the origins of all religions.

15. Various situations coexist in Europe. In some countries, one religion still predominates. Religious representatives may play a political role, as in the case of the bishops who sit in the United Kingdom House of Lords. Some countries have banned the wearing of religious symbols in schools. The legislation of several Council of Europe member states still contains anachronisms dating from times when religion played a more important part in our societies.

16. Freedom of religion is protected by Article 9 of the European Convention on Human Rights and Article 18 of the Universal Declaration on Human Rights. Such freedom is not unlimited, however: a religion whose doctrine or practice ran counter to other fundamental rights would be unacceptable. In any case, the restrictions that can be placed on such freedom are those that "are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" (Article 9.2 of the Convention).

17. Nor do may states allow the dissemination of religious principles which, if put into practice, would violate human rights. If doubts exist in this respect, states must require religious leaders to take an unambiguous stand in favour of the precedence of human rights, as set forth in the European Convention on Human Rights, over any religious principle.

18. Freedom of expression is one of the most important human rights, as the Assembly has repeatedly affirmed. In Recommendation 1510 (2006) on freedom of expression and respect for religious beliefs it expresses the view that "freedom of expression as protected under Article 10 of the European Convention on Human Rights should not be further restricted to meet increasing sensitivities of certain religious groups".

19. While we have an acknowledged duty to respect others and must discourage gratuitous insults, freedom of expression cannot, needless to say, be restricted out of deference to certain dogmas or the beliefs of a particular religious community.

20. With regard to relations between the Council of Europe and religious communities, certain steps have been taken in order to promote a closer relationship.

21. It will be remembered in this connection that religious leaders have addressed the Assembly on several occasions in the past, and that the Assembly has accepted, in return, to attend major conferences organised by the religious communities. Moreover, dozens of religious and humanist organisations are already represented at the Council of Europe by virtue of the participatory status of non-governmental organisations.

22. The Assembly welcomes the Committee of Ministers' proposal that "annual exchanges on the religious dimension of intercultural dialogue" be organised on an experimental basis with representatives of religions traditionally present in Europe and of civil society.

23. The Assembly therefore recommends that the Committee of Ministers:

23.1. ensure that religious communities may exercise the fundamental right of freedom of religion without hindrance in all Council of Europe member states in accordance with the provisions of Article 9 of the European Convention on Human Rights and Article 18 of the Universal Declaration of Human Rights;

23.2. rule out any interference in religious affairs, but consider religious organisations as part of civil society and call on them to play an active role in pursuit of peace, co-operation, tolerance, solidarity, intercultural dialogue and the dissemination of the Council of Europe's values;

23.3. reaffirm the principle of the independence of politics and law from religion;

23.4. continue to give thought to the religious dimension of intercultural dialogue, particularly by organising meetings with religious leaders

and representatives of humanist and philosophical circles;
23.5. exclude from the consultation any grouping that does not clearly support the Council of Europe's fundamental values, namely human rights, democracy and the rule of law;
23.6. Identify and disseminate examples of good practice in respect of dialogue with leaders of religious communities;
23.7. Consider setting up an institute to devise syllabuses, teaching methods and educational material for the study of the religious heritage of the Council of Europe member states; such syllabuses should be drawn up in close co-operation with representatives of the different religions traditionally present in Europe.

24. The Assembly further recommends that the Committee of Ministers encourage the member states:
24.1. to promote initial and in-service training for teachers with a view to the objective, balanced teaching of religions as they are today and religions in history, and to require human rights training for all religious leaders, in particular those with an educational role who are in contact with young people;
24.2. gradually to remove from legislation, if such is the will of the people, elements likely to be discriminatory from the angle of democratic religious pluralism.

COUNCIL OF EUROPE - PARLIAMENTARY ASSEMBLY, RECOMMENDATION 1805 (2007) ON BLASPHEMY, RELIGIOUS INSULTS AND HATE SPEECH AGAINST PERSONS ON GROUNDS OF THEIR RELIGION

Adopted 29 June 2007

1. The Parliamentary Assembly recalls its Resolution 1510 (2006) on freedom of expression and respect for religious beliefs and reiterates its commitment to the freedom of expression (Article 10 of the European Convention on Human Rights and the freedom of thought, conscience and religion (Article 9 of the Convention), which are fundamental cornerstones of democracy. Freedom of expression is not only applicable to expressions that are favourably received or regarded as inoffensive, but also to those that may shock, offend or disturb the state or any sector of population within the limits of Article 10 of the Convention. Any democratic society must permit open debate on matters relating to religion and beliefs.
2. The Assembly acknowledges the importance of respect for, and understanding of, cultural and religious diversity in Europe and throughout the world and recognises the need for ongoing dialogue. Respect and understanding can help avoid frictions within society and between individuals. Every human being should be respected, independently of religious beliefs.
3. In multicultural societies it is often necessary to reconcile freedom of expression and freedom of thought, conscience and religion. In some instances, it may also be necessary to place restrictions on these freedoms. Under the European Convention on Human Rights, any such restrictions must be prescribed by law, necessary in a democratic society and proportionate to the aims pursued. In so doing, States enjoy a margin of appreciation as national authorities may need to adopt different solutions taking account of the specific features of each society; the use of this margin is subject to the supervision of the European Court of Human Rights.
4. With regard to blasphemy, religious insults and hate speech against persons on the grounds of their religion, the state is responsible for determining what should count as criminal offences within the limits imposed by the case-law of the European Court of Human Rights. In this connection, the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere. Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.
5. The Assembly welcomes the preliminary report adopted on 16-17 March 2007 by the Venice Commission on this subject and agrees with the Venice Commission that in a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insult or

hate speech and does not constitute incitement to disturb the public peace or to violence and discrimination against adherents of a particular religion. Public debate, dialogue and improved communication skills of religious groups and the media should be used in order to lower sensitivity when it exceeds reasonable levels.

6. Recalling its Recommendation 1720 (2005) on education and religion, the Assembly emphasises the need for greater understanding and tolerance among individuals of different religions. Where people with different religions know more about the religion and religious sensitivities of each other, religious insults are less likely to occur out of ignorance.

7. In this context, the Assembly welcomes the initiative of the United Nations to set up a new body under the theme "Alliance of Civilisations" to study and support contacts between Muslim and so-called Western societies, but feels that such an initiative should be enlarged to other religions and non-religious groups.

8. The Assembly recalls the relevant case-law on freedom of expression under Article 10 of the European Convention on Human Rights developed by the European Court of Human Rights. Whereas there is little scope for restrictions on political speech or on the debate of questions of public interest, the Court accepts a wider margin of appreciation on the part of contracting states when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.

9. However, the Assembly stresses that this margin of appreciation is not unlimited and that any restrictions on the freedom of expression must comply with the case-law of the European Court of Human Rights. Freedom of expression – guaranteed under Article 10 of the European Convention on Human Rights – is of vital importance for any democratic society. In accordance with the Statute of the Council of Europe, common recognition of democratic values is the basis for membership of the Council of Europe.

10. The Assembly is aware that, in the past, national law and practice concerning blasphemy and other religious offences often reflected the dominant position of particular religions in individual states. In view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, blasphemy laws should be reviewed by member states and parliaments.

11. The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.

12. The Assembly reaffirms that hate speech against persons, whether on religious grounds or otherwise, should be penalised by law in accordance with the General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination produced by the European Commission against Racism and Intolerance. For speech to qualify as hate speech in this sense, it is necessary that it is directed against a person or a specific group of persons. National law should penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion.

13. The Assembly emphasises that freedom of religion as protected by Article 9 of the European Convention on Human Rights also protects religions in their establishing values for their followers. While religions are free to penalise in a religious sense any religious offences, such penalties must not threaten the life, physical integrity, liberty or property of an individual or women's civil and human rights. In this context, the Assembly recalls its Resolution 1535 (2007) on threats to the lives and freedom of expression of journalists and strongly condemns the death threats issued by Muslim leaders against journalists and writers. Member states have the obligation to protect individuals against religious penalties which threaten the right to life and the right to liberty and security of a person under Articles 2 and 5 of the European Convention on Human Rights. No state has the right to impose itself such penalties for religious offences, either.

14. The Assembly notes that member states have the obligation under Article 9 of the European Convention on Human Rights to protect freedom of religion including the freedom to manifest one's religion. This requires protection against disturbances by others of such manifestation. However, these rights may sometimes be subject to certain justified limitations. The challenge facing the authorities is how to strike a fair balance between the interests of individuals as members of a religious community in ensuring respect for their right to manifest their religion

or their right to education, and the general public interest or the rights and interests of others.

15. The Assembly considers that, as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2 of the European Convention on Human Rights, national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence.

16. It calls on national parliaments to initiate legislative action and scrutiny regarding the national implementation of this Recommendation.

17. The Assembly recommends that the Committee of Ministers:

17.1. take note of Resolution 1510 (2006) on freedom of expression and respect for religious beliefs together with this Recommendation and forward both texts to the relevant national ministries and authorities;

17.2. ensure that national law and practice:

17.2.1. permit open debate on matters relating to religion and beliefs and do not privilege a particular religion in this respect, which would be incompatible with Articles 10 and 14 of the European Convention on Human Rights;

17.2.2. penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds;

17.2.3. prohibit acts which intentionally and severely disturb the public order and call for public violence by references to religious matters, as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2 of the European Convention on Human Rights;

17.2.4. are reviewed in order to decriminalise blasphemy as an insult to a religion;

17.3. encourage member states to sign and ratify Protocol No. 12 to the European Convention on Human Rights (CETS No 177);

17.4. instruct its competent Steering Committee to draw up practical guidelines for national ministries of justice intended to facilitate the implementation of the recommendations contained in paragraph 17.2 above;

17.5. instruct its competent Steering Committee to draw up practical guidelines for national ministries of education intended to raise understanding and tolerance among students of different religions;

17.6. initiate through their national ministries of foreign affairs work at the level of the United Nations in order to ensure that:

17.6.1. national law and practice of signatory states of the International Convention on the Elimination of All Forms of Racial Discrimination do not privilege persons with a particular religion;

17.6.2. the work of the Alliance of Civilizations avoids the stereotype of a so-called "Western" culture, widens its scope to other world religions and promotes more open debates between different religious groups and with non-religious groups;

17.7. condemn on behalf of their governments any death threats and incitements to violence by religious leaders and groups issued against persons for having exercised their right to freedom of expression about religious matters;

17.8. invite member states to take more initiatives to promote tolerance, in co-operation with the European Commission against Racism and Intolerance (ECRI).

COUNCIL OF EUROPE – COMMITTEE OF MINISTERS, DECLARATION ON THE PROTECTION AND PROMOTION OF INVESTIGATIVE JOURNALISM (2007)

Adopted 26 September 2007

The Committee of Ministers of the Council of Europe,

1. Recalling Article 10 of the European Convention on Human Rights which guarantees the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers;

2. Recalling also its declarations on the freedom of expression and information of 29 April 1982 and on freedom of political debate in the media of 12 February 2004 and reiterating the importance of free and independent media for guaranteeing the right of the people to be fully informed on matters of public concern and to exercise scrutiny over public authorities and political affairs, as repeatedly confirmed by the European Court of Human Rights;

3. Convinced that the essential function of the media as public watchdog and as part of the system of checks and balances in a democracy would be severely crippled without promoting such investigative journalism, which helps to expose legal or ethical wrongs that might have been deliberately concealed, and thus contributes to the formation of enlightened and active citizenry, as well as to the improvement of society at large;

4. Acknowledging, in this context, the important work of investigative journalists who engage in accurate, in-depth and critical reporting on matters of special public concern, work which often requires long and difficult research, assembling and analysing information, uncovering unknown facts, verifying assumptions and obtaining corroborative evidence;

5. Emphasising, however, that investigative journalism needs to be distinguished from journalistic practices which involve probing into and exposing people's private and family lives in a way that would be incompatible with Articles 8 and 10 of the European Convention on Human Rights and the related case law of the European Court of Human Rights;

6. Bearing in mind also that investigative journalism could benefit from the adherence of media professionals to voluntarily adopted self-regulatory instruments such as professional codes of conduct and of ethics which take full account of the rights of other people and the role and responsibility of the media in a democratic society;

7. Considering that, because of its very nature, investigative journalism is of particular significance in times of crisis, a notion that includes, but is not limited to, wars, terrorist attacks and natural and man-made disasters, when there may be a temptation to limit the free flow of information for security or public safety reasons;

8. Conscious that in emerging democracies the encouragement and development of investigative journalism is especially important for the stimulation of free public opinion and the entrenchment of a democratic political culture while, at the same time, it is at a greater danger of potential abuse;

9. Bearing in mind the Parliamentary Assembly of the Council of Europe's Recommendation 1506 (2001) on freedom of expression and information in the media in Europe, and in particular its concern about the continuing use of violence as a way of intimidating investigative journalists;

10. Recalling its Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information;

11. Welcoming developments in certain member states' domestic case law tending to confirm and uphold the right of journalists to investigate matters of public interest and disclose facts and express opinions in respect of such matters without interference by public authorities,

I. Declares its support for investigative journalism in service of democracy.

II. Calls on member states to protect and promote investigative journalism, having regard to Article 10 of the European Convention on Human Rights, the relevant case law of the European Court of Human Rights and other Council of Europe standards, and in this context:

i. to take, where necessary, suitable measures designed to ensure the personal safety of media professionals, especially those involved in investigative journalism, and promptly investigate all cases of violence against or intimidation of journalists;

ii. to ensure the freedom of movement of media professionals and their access to information in line with Council of Europe standards and facilitate critical and in-depth reporting in service of democracy;

iii. to ensure the right of journalists to protect their sources of information in accordance with Council of Europe standards;

iv. to ensure that deprivation of liberty, disproportionate pecuniary sanctions, prohibition to exercise the journalistic profession, seizure of professional material or search of premises are not misused to intimidate media professionals and, in particular, investigative journalists;

v. to take into consideration and to incorporate into domestic legislation where appropriate the recent case law of the European Court of Human Rights which has interpreted Article 10 of the European Convention of Human Rights as extending its protection not only to the freedom to publish, but also to journalistic research, the important preceding stage which is essential for investigative journalism.

III. Draws the attention of member states to recent worrying developments which might have an adverse effect on journalistic activity and on investigative journalism in particular and calls on member states, if appropriate, to take remedial

action, in line with Council of Europe standards, when faced with the following situations:
i. an apparent trend towards increasing limitations on freedom of expression and information in the name of protecting public safety and fighting terrorism;
ii. lawsuits brought against media professionals for acquiring or publishing information of public interest which the authorities sought without good reason to keep undisclosed;
iii. cases of unjustified surveillance of journalists, including the monitoring of their communications;
iv. legislative measures being taken or sought to limit the protection granted to "whistle blowers".

IV. Invites the media, journalists and their associations to encourage and support investigative journalism while respecting human rights and applying high ethical standards.

V. Calls on member states to disseminate widely this declaration, where appropriate accompanied by a translation, and to bring it, in particular, to the attention of relevant governmental bodies, legislators and the judiciary as well as to make it available to journalists, the media and their professional organisations.

COUNCIL OF EUROPE - PARLIAMENTARY ASSEMBLY, RESOLUTION 1577 (2007) TOWARDS DECRIMINALISATION OF DEFAMATION

Adopted 4 October 2007

1. The Parliamentary Assembly, recalling its Recommendation 1589 (2003) on freedom of expression in the media in Europe and its Resolution 1535 (2007) on threats to the lives and freedom of expression of journalists, unequivocally reiterates that freedom of expression is a cornerstone of democracy. Where there is no real freedom of expression, there can be no real democracy.
2. The Assembly states from the outset that the press plays a fundamental role in promoting debates on issues of public concern; and debates of that kind – as open as possible – are vital to democracy.
3. The Assembly draws attention to its Resolution 1003 (1993) on the ethics of journalism and emphasises that those who exercise the right to freedom of expression also have duties and obligations. They must act in good faith and provide accurate, trustworthy information in compliance with journalistic ethics.
4. As established in the case law of the European Court of Human Rights (the Court), Article 10 of the European Convention on Human Rights (ETS No. 5) guarantees freedom of expression in respect not only of "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also of those that offend, shock or disturb.
5. The Assembly notes that freedom of expression is not unlimited and that it may prove necessary for the state to intervene in a democratic society, provided that there is a solid legal basis and that it is clearly in the public interest, in accordance with Article 10, paragraph 2, of the European Convention on Human Rights.
6. Anti-defamation laws pursue the legitimate aim of protecting the reputation and rights of others. The Assembly nonetheless urges member states to apply these laws with the utmost restraint since they can seriously infringe freedom of expression. For this reason, the Assembly insists that there be procedural safeguards enabling anyone charged with defamation to substantiate their statements in order to absolve themselves of possible criminal responsibility.
7. In addition, statements or allegations which are made in the public interest, even if they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and their truthfulness was checked with proper diligence.
8. The Assembly deplores the fact that in a number of member states prosecution for defamation is misused in what could be seen as attempts by the authorities to silence media criticism. Such abuse – leading to a genuine media self-censorship and causing progressive shrinkage of democratic debate and of the circulation of general information – has been denounced by civil society, notably in Albania, Azerbaijan and the Russian Federation.
9. The Assembly concurs with the clear position adopted by the Secretary General of the Council of Europe, who has denounced threats of prosecution for libel as "a particularly insidious form

of intimidation". The Assembly views such aberrant use of anti-defamation laws as unacceptable.

10. The Assembly also welcomes the efforts of the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE) in favour of decriminalising defamation, and his unfaltering commitment to media freedom.

11. It notes with great concern that in many member states the law provides for prison sentences for defamation and that some still impose them in practice – for example, Azerbaijan and Turkey.

12. Every case of imprisonment of a media professional is an unacceptable hindrance to freedom of expression and entails that, despite the fact that their work is in the public interest, journalists have a sword of Damocles hanging over them. The whole of society suffers the consequences when journalists are gagged by pressure of this kind.

13. The Assembly consequently takes the view that prison sentences for defamation should be abolished without further delay. In particular it exhorts states whose laws still provide for prison sentences – although prison sentences are not actually imposed – to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.

14. The Assembly likewise condemns abusive recourse to unreasonably large awards for damages and interest in defamation cases and points out that a compensation award of a disproportionate amount may also contravene Article 10 of the European Convention on Human Rights.

15. The Assembly is aware that abuse of freedom of expression can be dangerous, as history shows. As recently acknowledged in a framework decision applicable to member countries of the European Union, it must be possible to prosecute those who incite violence, promote negationism or racial hatred, conduct inimical to the values of pluralism, tolerance and open-mindedness which the Council of Europe and the European Convention on Human Rights promote.

16. Lastly, the Assembly would reaffirm that protection of journalists' sources is of paramount public interest. Journalists prosecuted for defamation must be allowed to protect their sources or to produce a document in their own defence without having to show that they obtained it through lawful channels.

17. The Assembly accordingly calls on the member states to:

17.1. abolish prison sentences for defamation without delay;

17.2. guarantee that there is no misuse of criminal prosecutions for defamation and safeguard the independence of prosecutors in these cases;

17.3. define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law and to ensure that civil law provides effective protection of the dignity of persons affected by defamation;

17.4. in accordance with General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI), make it a criminal offence to publicly incite to violence, hatred or discrimination, or to threaten an individual or group of persons, for reasons of race, colour, language, religion, nationality or national or ethnic origin where those acts are deliberate;

17.5. make only incitement to violence, hate speech and promotion of negationism punishable by imprisonment;

17.6. remove from their defamation legislation any increased protection for public figures, in accordance with the Court's case law, and in particular calls on:

17.6.1. Turkey to amend Article 125.3 of its Criminal Code accordingly;

17.6.2. France to revise its law of 29 July 1881 in the light of the Court's case law;

17.7. ensure that under their legislation persons pursued for defamation have appropriate means of defending themselves, in particular means based on establishing the truth of their assertions and on the general interest, and calls in particular on France to amend or repeal Article 35 of its law of 29 July 1881 which provides for unjustified exceptions preventing the defendant from establishing the truth of the alleged defamation;

17.8. set reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk;

17.9. provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury;

17.10. bring their laws into line with the case law of the Court as regards the protection of journalists' sources.

18. The Assembly calls on journalists' professional organisations to draw up codes of journalistic ethics if they have not already done so.

19. Furthermore, it welcomes the moves by the Turkish authorities to amend Article 301 of the Turkish Criminal Code concerning "denigration of Turkishness" and strongly encourages these authorities to pursue that course of action without delay.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, RECOMMENDATION CM/REC(2007)15 ON MEASURES CONCERNING MEDIA COVERAGE OF ELECTION CAMPAIGNS

Adopted 7 November 2007

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe;

Noting the important role of the media in modern societies, especially at the time of elections;

Considering the constant development of information and communication technology and the evolving media landscape which necessitates the revision of Recommendation No. R (99) 15 of the Committee of Ministers on measures concerning media coverage of election campaigns;

Aware of the need to take account of the significant differences which still exist between the print and the broadcast media;

Considering the differences between linear and non-linear audiovisual media services, in particular as regards their reach, impact and the way in which they are consumed;

Stressing that the fundamental principle of editorial independence of the media assumes a special importance in election periods;

Underlining that the coverage of elections by the broadcast media should be fair, balanced and impartial;

Recalling the basic principles contained in Resolution No. 2 adopted at the 4th Ministerial Conference on Mass Media Policy (Prague, December 1994), and Recommendation No. R (96) 10 of the Committee of Ministers on the guarantee of the independence of public service broadcasting;

Noting the emergence of public service media in the information society as elaborated in Recommendation Rec(2007)3 of the Committee of Ministers on the remit of public service media in the information society;

Considering that public service media are a publicly accountable source of information which have a particular responsibility in ensuring in their programmes, a fair, balanced and thorough coverage of elections, which may include the carrying of messages of political parties and candidates free of charge and on an equitable basis;

Noting that particular attention should be paid to certain specific features of the coverage of election campaigns, such as the dissemination of opinion polls, paid political advertising, the right of reply, days of reflection and provision for pre-election time;

Stressing the important role of self-regulatory measures by media professionals themselves – for example, in the form of codes of conduct – which set out guidelines of good practice for responsible, accurate and fair coverage of election campaigns;

Recognising the complementary nature of regulatory and self-regulatory measures in this area;

Convinced of the usefulness of appropriate frameworks for media coverage of elections to contribute to free and democratic elections, bearing in mind the different legal and practical approaches of member states in this area and the fact that it can be subject to different branches of law;

Acknowledging that any regulatory framework on the media coverage of elections should respect the fundamental principle of freedom of expression protected under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights;

Recalling Recommendation Rec(2004)16 of the Committee of Ministers on the right of reply in the new media environment which allows the possibility for easy-to-use instant or rapid correction of contested information,

Recommends that the governments of the member states, if they have not already done so, examine ways of ensuring respect for the principles stated hereinafter regarding the coverage of election campaigns by the media, and, where necessary, adopt appropriate measures to implement these principles in their domestic law or practice and in accordance with constitutional law.

Definition

For the purposes of this recommendation:

The term "media" refers to those responsible for the periodic creation of information and content and its dissemination over which there is editorial responsibility, irrespective of the means and technology used for delivery, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. This could, *inter alia*, include print media (newspapers, periodicals) and media disseminated over electronic communication networks, such as broadcast media (radio, television and other linear audiovisual media services), online news-services (such as online editions of newspapers and newsletters) and non-linear audiovisual media services (such as on-demand television).

Scope of the recommendation

The principles of this recommendation apply to all types of political elections taking place in member states, including presidential, legislative, regional and, where practicable, local elections and referenda.

These principles should also apply, where relevant, to media reporting on elections taking place abroad, especially when these media address persons in the country where the election is taking place.

In member states where the notion of the "pre-election period" is defined under domestic legislation, the principles contained in this recommendation should also apply.

Principles

I. General provisions

1. Non-interference by public authorities

Public authorities should refrain from interfering in the activities of journalists and other media personnel with a view to influencing the elections.

2. Protection against attacks, intimidation or other types of unlawful pressure on the media

Public authorities should take appropriate steps for the effective protection of journalists and other media personnel and their premises, as this assumes a greater significance during elections. At the same time, this protection should not obstruct the media in carrying out their work.

3. Editorial independence

Regulatory frameworks on media coverage of elections should respect the editorial independence of the media.

Member states should ensure that there is an effective and manifest separation between the exercise of control of media and decision making as regards media content and the exercise of political authority or influence.

4. Ownership by public authorities

Member states should adopt measures whereby the media which are owned by public authorities, when covering election campaigns, should do so in a fair, balanced and impartial manner, without discriminating against or supporting a specific political party or candidate.

If such media outlets accept paid political advertising in their publications, they should ensure that all political contenders and parties that request the purchase of advertising space are treated in an equal and non-discriminatory manner.

5. Professional and ethical standards of the media

All media are encouraged to develop self-regulatory frameworks and incorporate self-regulatory professional and ethical standards regarding their coverage of election campaigns, including, *inter alia,* respect for the principles of human dignity and non-discrimination. These standards should reflect their particular roles and responsibilities in democratic processes.

6. Transparency of, and access to, the media

If the media accept paid political advertising, regulatory or self-regulatory frameworks should ensure that such advertising is readily recognisable as such.

Where media is owned by political parties or politicians, member states should ensure that this is made transparent to the public.

7. The right of reply or equivalent remedies

Given the short duration of an election campaign, any candidate or political party which is entitled to a right of reply or equivalent remedies under national law or systems should be able to exercise this right or equivalent remedies during the campaign period without undue delay.

8. Opinion polls

Regulatory or self-regulatory frameworks should ensure that the media will, when disseminating the results of opinion polls, provide the public with sufficient information to make a judgement on the value of the polls. Such information could, in particular:

- name the political party or other organisation or person which commissioned and paid for the poll;
- identify the organisation conducting the poll and the methodology employed;
- indicate the sample and margin of error of the poll;
- indicate the date and/or period when the poll was conducted.

All other matters concerning the way in which the media present the results of opinion polls should be decided by the media themselves.

Any restriction by member states forbidding the publication/dissemination of opinion polls (on voting intentions) on voting day or a number of days before the election should comply with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights.

Similarly, in respect of exit polls, member states may consider prohibiting reporting by the media on the results of such polls until all polling stations in the country have closed.

9. "Day of reflection"

Member states may consider the merits of including a provision in their regulatory frameworks to prohibit the dissemination of partisan electoral messages on the day preceding voting or to provide for their correction.

II. Measures concerning broadcast media

1. General framework

During election campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media.

With due respect for the editorial independence of broadcasters, regulatory frameworks should also provide for the obligation to cover election campaigns in a fair, balanced and impartial manner in the overall programme services of broadcasters. Such an obligation should apply to both public service media and private broadcasters in their relevant transmission areas.

Member states may derogate from these measures with respect to those broadcast media services exclusively devoted to, and clearly identified as, the self-promotion of a political party or candidate.

2. News and current affairs programmes

Where self-regulation does not provide for this, member states should adopt measures whereby public service media and private broadcasters, during the election period, should in particular be fair, balanced and impartial in their news and current affairs programmes, including discussion programmes such as interviews or debates.

No privileged treatment should be given by broadcasters to public authorities during such programmes. This matter should primarily be addressed via appropriate self-regulatory measures. In this connection, member states might examine whether, where practicable, the relevant authorities monitoring the coverage of elections should be given the power to intervene in order to remedy possible shortcomings.

3. Non-linear audiovisual services of public service media

Member states should apply the principles contained in points 1 and 2 above or similar provisions to non-linear audiovisual media services of public service media.

4. Free airtime and equivalent presence for political parties/candidates on public service media

Member states may examine the advisability of including in their regulatory frameworks provisions whereby public service media may make available free airtime on their broadcast and other linear audiovisual media services and/or an equivalent presence on their non-linear audiovisual media services to political parties/candidates during the election period.

Wherever such airtime and/or equivalent presence is granted, this should be done in a fair and non-discriminatory manner, on the basis of transparent and objective criteria.

5. Paid political advertising

In member states where political parties and candidates are permitted to buy advertising space for election purposes, regulatory frameworks should ensure that all contending parties have the possibility of buying advertising space on and according to equal conditions and rates of payment.

Member states may consider introducing a provision in their regulatory frameworks to limit the amount of political advertising space and time which a given party or candidate can purchase.

Regular presenters of news and current affairs programmes should not take part in paid political advertising.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, RECOMMENDATION REC (2007) 16 ON MEASURES TO PROMOTE THE PUBLIC SERVICE VALUE OF THE INTERNET

Adopted 7 November 2007

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Recalling that States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights – ETS No. 5) have undertaken to secure to everyone within their jurisdiction the human rights and fundamental freedoms defined in the Convention;

Mindful of the particular roles and responsibilities of member states in securing the protection and promotion of these rights and freedoms;

Noting that information and communication technologies (ICTs) can, on the one hand, significantly enhance the exercise of human rights and fundamental freedoms, such as the right to freedom of expression, information and communication, the right to education, the right to assembly, and the right to free elections, while, on the other hand, they may adversely affect these and other rights, freedoms and values, such as the respect for private life and secrecy of correspondence, the dignity of human beings and even the right to life;

Concerned by the risk of harm posed by content and communications on the Internet and other ICTs as well as by the threats of cybercrime to the exercise and enjoyment of human rights and fundamental freedoms, and recalling in this regard the Convention on Cybercrime (ETS No. 185) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189) and the specific provisions in the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201);

Aware that communication using new information and communication technologies and services must respect the right to privacy as guaranteed by Article 8 of the European Convention on Human Rights and by the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), and as elaborated by Recommendation No. R (99) 5 of the Committee of Ministers to member states on the protection of privacy on the Internet;

Noting that the outcome documents of the World Summit on the Information Society (WSIS) (Geneva 2003 – Tunis 2005) recognise the right for everyone to benefit from the information society and reaffirmed the desire and commitment of participating states to build a people-centred, inclusive and development-oriented information society, respecting fully and upholding the Universal Declaration of Human Rights, as well as the universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms, including the right to development;

Convinced that access to and the capacity and ability to use the Internet should be regarded as indispensable for the full exercise and enjoyment of human rights and fundamental freedoms in the information society;

Recalling the 2003 UNESCO Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace, which calls on member states and international organisations to promote access to the Internet as a service of public interest;

Recalling the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states that freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies, and which calls

on Parties to encourage individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions;

Aware that the media landscape is rapidly changing and that the Internet is playing an increasingly important role in providing and promoting diverse sources of information to the public, including user-generated content;

Noting that our societies are rapidly moving into a new phase of development, towards a ubiquitous information society, and therefore that the Internet constitutes a new pervasive social and public space which should have an ethical dimension, which should foster justice, dignity and respect for the human being and which should be based on respect for human rights and fundamental freedoms, democracy and the rule of law;

Recalling the currently accepted working definition of Internet governance, as the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures and programmes that shape the evolution and use of the Internet;

Convinced therefore that the governance of the Internet should be people-centred and pursue public policy goals which protect human rights, democracy and the rule of law on the Internet and other ICTs;

Aware of the public service value of the Internet, understood as people's significant reliance on the Internet as an essential tool for their everyday activities (communication, information, knowledge, commercial transactions) and the resulting legitimate expectation that Internet services be accessible and affordable, secure, reliable and ongoing;

Firmly convinced that the Internet and other ICT services have high public service value in that they serve to promote the exercise and enjoyment of human rights and fundamental freedoms for all who use them, and that their protection should be a priority with regard to the governance of the Internet,

Recommends that, having regard to the guidelines in the appendix to this recommendation, the governments of member states, in co-operation, where appropriate, with all relevant stakeholders, take all necessary measures to promote the public service value of the Internet by:

- upholding human rights, democracy and the rule of law on the Internet and promoting social cohesion, respect for cultural diversity and trust between individuals and between peoples in the use of ICTs, and in particular, the Internet;
- elaborating and delineating the boundaries of the roles and responsibilities of all key stakeholders within a clear legal framework, using complementary regulatory frameworks;
- encouraging the private sector to acknowledge and familiarise itself with its evolving ethical roles and responsibilities, and to co-operate in reviewing and, where necessary, adjusting its key actions and decisions which may impact on individual rights and freedoms;
- encouraging in this regard the private sector to develop, where appropriate and in co-operation with other stakeholders, new forms of open and transparent self- and co-regulation on the basis of which key actors can be held accountable;
- encouraging the private sector to contribute to achieving the goals set out in this recommendation and developing public policies to supplement the operation of market forces where these are insufficient;
- bringing this recommendation to the attention of all relevant stakeholders, in particular the private sector and civil society, so that all necessary measures are taken to contribute to the implementation of its objectives.

Appendix to the recommendation

I. Human rights and democracy

Human rights

Member states should adopt or develop policies to preserve and, whenever possible, enhance the protection of human rights and respect for the rule of law in the information society. In this regard, particular attention should be paid to:
- the right to freedom of expression, information and communication on the Internet and via other ICTs promoted, inter alia, by ensuring access to them;
- the need to ensure that there are no restrictions to the abovementioned right (for example in the form of censorship) other than to the extent permitted by Article 10 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights;
- the right to private life and private correspondence on the Internet and in the use of other ICTs, including the respect for the will of users not to disclose their identity, promoted by encouraging individual users and Internet service and content providers to share the responsibility for this;
- the right to education, including media and information literacy;

- the fundamental values of pluralism, cultural and linguistic diversity, and non-discriminatory access to different means of communication via the Internet and other ICTs;
- the dignity and integrity of the human being with regard to the trafficking of human beings carried out using ICTs and by signing and ratifying the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197);
- the right to the presumption of innocence, which should be respected in the digital environment, and the right to a fair trial and the principle according to which there should be no punishment without law, which should be upheld by developing and encouraging legal, and also self- and co-regulatory frameworks for journalists and media service providers as concerns the reporting on court proceedings;
- the freedom for all groups in society to participate in ICT-assisted assemblies and other forms of associative life, subject to no other restrictions than those provided for by Article 11 of the European Convention on Human Rights as interpreted by the European Court of Human Rights;
- the right to property, including intellectual property rights, subject to the right of the state to limit the use of property in accordance with the general interest as provided by Article 1 of The Protocol to the European Convention on Human Rights (ETS No. 9).

Democracy

Member states should develop and implement strategies for e-democracy, e-participation and e-government that make effective use of ICTs in democratic process and debate, in relationships between public authorities and civil society, and in the provision of public services as part of an integrated approach that makes full and appropriate use of a number of communication channels, both online and offline. In particular, e-democracy and e-governance should uphold human rights, democracy and the rule of law by:
- strengthening the participation, initiative and involvement of citizens in national, regional and local public life and in decision-making processes, thereby contributing to more dynamic, inclusive and direct forms of democracy, genuine public debate, better legislation and active scrutiny of the decision-making processes;
- improving public administration and services by making them more accessible (inter alia through access to official documents), responsive, user-oriented, transparent, efficient and cost-effective, thus contributing to the economic and cultural vitality of society.

Member states should, where appropriate, consider introducing only e-voting systems which are secure, reliable, efficient, technically robust, open to independent verification and easily accessible to voters, in line with Recommendation Rec(2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting.

Member states should encourage the use of ICTs (including online forums, weblogs, political chats, instant messaging and other forms of citizen-to-citizen communication) by citizens, non-governmental organisations and political parties to engage in democratic deliberations, e-activism and e-campaigning, put forward their concerns, ideas and initiatives, promote dialogue and deliberation with representatives and government, and to scrutinise officials and politicians in matters of public interest.

Member states should use the Internet and other ICTs in conjunction with other channels of communication to formulate and implement policies for education for democratic citizenship to enable individuals to be active and responsible citizens throughout their lives, to respect the rights of others and to contribute to the defence and development of democratic societies and cultures.

Member states should promote public discussion on the responsibilities of private actors, such as Internet service providers, content providers and users, and encourage them – in the interests of the democratic process and debate and the protection of the rights of others – to take self-regulatory and other measures to optimise the quality and reliability of information on the Internet and to promote the exercise of professional responsibility, in particular with regard to the establishment, compliance with, and monitoring of the observance of codes of conduct.

II. Access

Member states should develop, in co-operation with the private sector and civil society, strategies which promote sustainable economic growth via competitive market structures in order to stimulate investment, particularly from local capital, into critical Internet resources and ICTs, especially in areas with a low communication and information infrastructure, with particular reference to:

- developing strategies which promote affordable access to ICT infrastructure, including the Internet;

- promoting technical interoperability, open standards and cultural diversity in ICT policy covering telecommunications, broadcasting and the Internet;

- promoting a diversity of software models, including proprietary, free and open source software;

- promoting affordable access to the Internet for individuals, irrespective of their age, gender, ethnic or social origin, including the following persons and groups of persons:

a. those on low incomes;

b. those in rural and geographically remote areas; and

c. those with special needs (for example, disabled persons), bearing in mind the importance of design and application, affordability, the need to raise awareness among these persons and groups, the appropriateness and attractiveness of Internet access and services as well as their adaptability and compatibility;

- promoting a minimum number of Internet access points and ICT services on the premises of public authorities and, where appropriate, in other public places, in line with Recommendation No. R (99) 14 of the Committee of Ministers to member states on universal community service concerning new communication services;

- encouraging, where practicable, public administrations, educational institutions and private owners of access facilities to new communication and information services to enable the general public to use these facilities;

- promoting the integration of ICTs into education and promoting media and information literacy and training in formal and non-formal education sectors for children and adults in order to:

a. empower them to use media technologies effectively to create, access, store, retrieve and share content to meet their individual and community needs and interests;

b. encourage them to exercise their democratic rights and civic responsibilities effectively;

c. encourage them to make informed choices when using the Internet and other ICTs by using and referring to diverse media forms and content from different cultural and institutional sources; understanding how and why media content is produced; critically analysing the techniques, language and conventions used by the media and the messages they convey; and identifying media content and services that may be unsolicited, offensive or harmful.

III. Openness

Member states should affirm freedom of expression and the free circulation of information on the Internet, balancing them, where necessary, with other legitimate rights and interests, in accordance with Article 10, paragraph 2, of the European Convention on Human Rights as interpreted by the European Court of Human Rights, by:

- promoting the active participation of the public in using, and contributing content to, the Internet and other ICTs;

- promoting freedom of communication and creation on the Internet, regardless of frontiers, in particular by:

a. not subjecting individuals to any licensing or other requirements having a similar effect, nor any general blocking or filtering measures by public authorities, or restrictions that go further than those applied to other means of content delivery;

b. facilitating, where appropriate, "re-users", meaning those wishing to exploit existing digital content resources in order to create future content or services in a way that is compatible with respect for intellectual property rights;

c. promoting an open offer of services and accessible, usable and exploitable content via the Internet which caters to the different needs of users and social groups, in particular by:

- allowing service providers to operate in a regulatory framework which guarantees them non-discriminatory access to national and international telecommunication networks;

- increasing the provision and transparency of their online services to citizens and businesses;

- engaging with the public, where appropriate, through user-generated communities rather than official websites;

- encouraging, where appropriate, the re-use of public data by non-commercial users, so as to allow every individual access to public information, facilitating their participation in public life and democratic processes;

- promoting public domain information accessibility via the Internet which includes government documents, allowing all persons to participate in the process of government; information about personal data retained by public entities; scientific and historical data; information on the state of technology, allowing the public to consider how the information society might guard against information warfare and

other threats to human rights; creative works that are part of a shared cultural base, allowing persons to participate actively in their community and cultural history;
- adapting and extending the remit of public service media, in line with Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, so as to cover the Internet and other new communication services and so that both generalist and specialised contents and services can be offered, as well as distinct personalised interactive and on-demand services.

IV. Diversity

Member states are encouraged to ensure that Internet and ICT content is contributed by all regions, countries and communities so as to ensure over time representation of all peoples, nations, cultures and languages, in particular by:
- encouraging and promoting the growth of national or local cultural industries, especially in the field of digital content production, including that undertaken by public service media, where necessary crossing linguistic and cultural barriers (including all potential content creators and other stakeholders), in order to encourage linguistic diversity and artistic expression on the Internet and other new communication services. This should
apply also to educational, cultural, scientific, scholarly and other content which may not be commercially viable in accordance with the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions;
- developing strategies and policies and creating appropriate legal and institutional frameworks to preserve the digital heritage of lasting cultural, scientific, or other values, in co-operation with holders of copyright and neighbouring rights, and other legitimate stakeholders in order, where appropriate, to set common standards and ensure compatibility and share resources. In this regard, access to legally deposited digital heritage materials, within reasonable restrictions, should also be assured;
- developing a culture of participation and involvement, *inter alia* by providing for the creation, modification and remixing of interactive content and the transformation of consumers into active communicators and creators of content;
- promoting mechanisms for the production and distribution of user- and community-generated content (thereby facilitating online communities), *inter alia* by encouraging public service media to use such content and co-operate with such communities;
- encouraging the creation and processing of and access to educational, cultural and scientific content in digital form, so as to ensure that all cultures can express themselves and have access to the Internet in all languages, including indigenous ones;
- encouraging capacity building for the production of local and indigenous content on the Internet;
- encouraging the multilingualisation of the Internet so that everyone can use it in their own language.

V. Security

Member states should engage in international legal co-operation as a means of developing and strengthening security on the Internet and observance of international law, in particular by:
- signing and ratifying the Convention on Cybercrime (ETS No. 185) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189), in order to be able to implement a common criminal policy aimed at the protection of society against cybercrime, to co-operate for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence, and to resolve jurisdictional problems in cases of crimes committed in other states parties to the convention;
- promoting the signature and ratification of the Convention and Additional Protocol by non-member states as well as their use as model cybercrime legislation at the national level, so that a worldwide interoperable system and framework for global co-operation in fighting cybercrime among interested countries emerges;
- enhancing network and information security to enable them to resist actions that compromise their stability as well as the availability, authenticity, integrity and confidentiality of stored or transmitted data and the related services offered by or accessible via these networks and systems;
- empowering stakeholders to protect network and information security;
- adopting legislation and establishing appropriate enforcement authorities, where necessary, to combat spam. Member states should also facilitate the development of appropriate technical solutions related to combating spam, improve

education and awareness among all stakeholders and encourage industry-driven initiatives, as well as engage in cross-border spam enforcement co-operation;
- encouraging the development of common rules on the co-operation between providers of information society services and law enforcement authorities ensuring that such co-operation has a clear legal basis and respects privacy regulations;
- protecting personal data and privacy on the Internet and other ICTs (to protect users against the unlawful storage of personal data, the storage of inaccurate personal data, or the abuse or unauthorised disclosure of such data, or against the intrusion of their privacy through, for example, unsolicited communications for direct marketing purposes) and harmonising legal frameworks in this area without unjustifiably disrupting the free flow of information, in particular by:
a. improving their domestic frameworks for privacy law in accordance with Article 8 of the European Convention on Human Rights and by signing and ratifying the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108);
b. providing appropriate safeguards for the transfer of international personal data to states which do not have an adequate level of data protection;
c. facilitating cross-border co-operation in privacy law enforcement;
- combating piracy in the field of copyright and neighbouring rights;
- working together with the business sector and consumer representatives to ensure e-commerce users are afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce. This may include the introduction of requirements concerning contracts which can be concluded by electronic means, in particular requirements concerning secure electronic signatures;
- promoting the safer use of the Internet and of ICTs, particularly for children, fighting against illegal content and tackling harmful and, where necessary, unwanted content through regulation, the encouragement of self-regulation, including the elaboration of codes of conduct, and the development of adequate technical standards and systems;
- promoting the signature and ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, RECOMMENDATION CM/REC(2008)6 ON MEASURES TO PROMOTE THE RESPECT FOR FREEDOM OF EXPRESSION AND INFORMATION WITH REGARD TO INTERNET FILTERS

Adopted 26 March 2008

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,
Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;
Recalling that States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights – ETS No. 5) have undertaken to secure to everyone within their jurisdiction the human rights and fundamental freedoms defined in the Convention;
Reaffirming the commitment of member states to the fundamental right to freedom of expression and to receive and impart information and ideas without interference by public authorities and regardless of frontiers, as guaranteed by Article 10 of the European Convention on Human Rights;
Aware that any intervention by member states that forbids access to specific Internet content may constitute a restriction on freedom of expression and access to information in the online environment and that such a restriction would have to fulfil the conditions in Article 10, paragraph 2, of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights;
Recalling in this respect the Declaration on human rights and the rule of law in the informa-

tion society, adopted by the Committee of Ministers on 13 May 2005, according to which member states should maintain and enhance legal and practical measures to prevent state and private censorship;

Recalling Recommendation Rec(2007)11 of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment, according to which member states, the private sector and civil society are encouraged to develop common standards and strategies to promote transparency and the provision of information, guidance and assistance to the individual users of technologies and services concerning, inter alia, the blocking of access to and filtering of content and services with regard to the right to receive and impart information;

Noting that the voluntary and responsible use of Internet filters (products, systems and measures to block or filter Internet content) can promote confidence and security on the Internet for users, in particular children and young people, while also aware that the use of such filters can impact on the right to freedom of expression and information, as protected by Article 10 of the European Convention on Human Rights;

Recalling Recommendation Rec(2006)12 of the Committee of Ministers on empowering children in the new information and communications environment, which underlines the importance of information literacy and training strategies for children to enable them to better understand and deal with content (for example violence and self-harm, pornography, discrimination and racism) and behaviours (such as grooming, bullying, harassment or stalking) carrying a risk of harm, thereby promoting a greater sense of confidence, well-being and respect for others in the new information and communications environment;

Convinced of the necessity to ensure that users are made aware of, understand and are able to effectively use, adjust and control filters according to their individual needs;

Recalling Recommendation Rec(2001)8 of the Committee of Ministers on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), which encourages the neutral labelling of content to enable users to make their own value judgements over such content and the development of a wide range of search tools and filtering profiles, which provide users with the ability to select content on the basis of content descriptors;

Aware of the public service value of the Internet, understood as people's significant reliance on the Internet as an essential tool for their everyday activities (communication, information, knowledge, commercial transactions, entertainment) and the resulting legitimate expectation that Internet services be accessible, affordable, secure, reliable and ongoing and recalling in this regard Recommendation Rec(2007)16 of the Committee of Ministers on measures to promote the public service value of the Internet;

Recalling the Declaration of the Committee of Ministers on freedom of communication on the Internet of 28 May 2003, which stresses that public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers, but that this does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries;

Reaffirming the commitment of member states to everyone's right to private life and secrecy of correspondence, as protected by Article 8 of the European Convention on Human Rights, and recalling the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and its Additional Protocol regarding supervisory authorities and transborder data flows (ETS No. 181) as well as Recommendation No. R (99) 5 of the Committee of Ministers on the protection of privacy on the Internet,

Recommends that member states adopt common standards and strategies with regard to Internet filters to promote the full exercise and enjoyment of the right to freedom of expression and information and related rights and freedoms in the European Convention on Human Rights, in particular by:

– taking measures with regard to Internet filters in line with the guidelines set out in the appendix to this recommendation;

– bringing these guidelines to the attention of all relevant private and public sector stakeholders, in particular those who design, use (install, activate, deactivate and implement) and monitor Internet filters, and to civil society, so that they may contribute to their implementation.

Appendix to Recommendation CM/Rec(2008)6

Guidelines

I. Using and controlling Internet filters in order to fully exercise and enjoy the right to freedom of expression and information

Users' awareness, understanding of and ability to effectively use Internet filters are key factors which enable them to fully exercise and enjoy their human rights and fundamental freedoms, in particular the right to freedom of expression and information, and to participate actively in democratic processes. When confronted with filters, users must be informed that a filter is active and, where appropriate, be able to identify and to control the level of filtering the content they access is subject to. Moreover, they should have the possibility to challenge the blocking or filtering of content and to seek clarifications and remedies.

In co-operation with the private sector and civil society, member states should ensure that users are made aware of activated filters and, where appropriate, are able to activate and deactivate them and be assisted in varying the level of filtering in operation, in particular by:

i. developing and promoting a minimum level of information for users to enable them to identify when filtering has been activated and to understand how, and according to which criteria, the filtering operates (for example, black lists, white lists, keyword blocking, content rating, etc., or combinations thereof);

ii. developing minimum levels of and standards for the information provided to the user to explain why a specific type of content has been filtered;

iii. regularly reviewing and updating filters in order to improve their effectiveness, proportionality and legitimacy in relation to their intended purpose;

iv. providing clear and concise information and guidance regarding the manual overriding of an activated filter, namely whom to contact when it appears that content has been unreasonably blocked and the reasons which may allow a filter to be overridden for a specific type of content or Uniform Resource Locator (URL);

v. ensuring that content filtered by mistake or error can be accessed without undue difficulty and within a reasonable time;

vi. promoting initiatives to raise awareness of the social and ethical responsibilities of those actors who design, use and monitor filters with particular regard to the right to freedom of expression and information and to the right to private life, as well as to the active participation in public life and democratic processes;

vii. raising awareness of the potential limitations to freedom of expression and information and the right to private life resulting from the use of filters and of the need to ensure proportionality of such limitations;

viii. facilitating an exchange of experiences and best practices with regard to the design, use and monitoring of filters;

ix. encouraging the provision of training courses for network administrators, parents, educators and other people using and monitoring filters;

x. promoting and co-operating with existing initiatives to foster responsible use of filters in compliance with human rights, democracy and the rule of law;

xi. fostering filtering standards and benchmarks to help users choose and best control filters.

In this context, civil society should be encouraged to raise users' awareness of the potential benefits and dangers of filters. This should include promoting the importance and significance of free and unhindered access to the Internet so that every individual user may fully exercise and enjoy their human rights and fundamental freedoms, in particular the right to freedom of expression and information and the right to private life, as well as to effectively participate in public life and democratic processes.

II. Appropriate filtering for children and young people

The Internet has significantly increased the number and diversity of ideas, information and opinions which people may receive and impart in the fulfilment of their right to freedom of expression and information without interference by public authorities and regardless of frontiers. At the same time, it has increased the amount of readily available content carrying a risk of harm, particularly for children and young people. To satisfy the legitimate desire and duty of member states to protect children and young people from content carrying a risk of harm, the proportionate use of filters can constitute an appropriate means of encouraging access to and confident use of the Internet and be a complement to other strategies on how to tackle harmful content, such as the development and provision of information literacy.

In this context, member states should:

i. facilitate the development of strategies to identify content carrying a risk of harm for children

and young people, taking into account the diversity of cultures, values and opinions;

ii. co-operate with the private sector and civil society to avoid over-protection of children and young people by, *inter alia*, supporting research and development for the production of "intelligent" filters that take more account of the context in which the information is provided (for example by differentiating between harmful content itself and unproblematic references to it, such as may be found on scientific websites);

iii. facilitate and promote initiatives that assist parents and educators in the selection and use of developmental-age appropriate filters for children and young people;

iv. inform children and young people about the benefits and dangers of Internet content and its filtering as part of media education strategies in formal and non-formal education.

Furthermore, the private sector should be encouraged to:

i. develop "intelligent" filters offering developmental-age appropriate filtering which can be adapted to follow the child's progress and age while, at the same time, ensuring that filtering does not occur when the content is deemed neither harmful nor unsuitable for the group which the filter has been activated to protect;

ii. co-operate with self- and co-regulatory bodies in order to develop standards for developmental-age appropriate rating systems for content carrying a risk of harm, taking into account the diversity of cultures, values and opinions;

iii. develop, in co-operation with civil society, common labels for filters to assist parents and educators in making informed choices when acquiring filters and to certify that they meet certain quality requirements;

iv. promote the interoperability of systems for the self-classification of content by providers and help to increase awareness about the potential benefits and dangers of such classification models.

Moreover, civil society should be encouraged to:

i. debate and share their experiences and knowledge when assessing and raising awareness of the development and use of filters as a protective measure for children and young people;

ii regularly monitor and analyse the use and impact of filters for children and young people, with particular regard to their effectiveness and their contribution to the exercise and enjoyment of the rights and freedoms guaranteed by Article 10 and other provisions of the European Convention on Human Rights.

III. Use and application of Internet filters by the public and private sector

Notwithstanding the importance of empowering users to use and control filters as mentioned above, and noting the wider public service value of the Internet, public actors on all levels (such as administrations, libraries and educational institutions) which introduce filters or use them when delivering services to the public, should ensure full respect for all users' right to freedom of expression and information and their right to private life and secrecy of correspondence.

In this context, member states should:

i. refrain from filtering Internet content in electronic communications networks operated by public actors for reasons other than those laid down in Article 10, paragraph 2, of the European Convention on Human Rights, as interpreted by the European Court of Human Rights;

ii. guarantee that nationwide general blocking or filtering measures are only introduced by the state if the conditions of Article 10, paragraph 2, of the European Convention on Human Rights are fulfilled. Such action by the state should only be taken if the filtering concerns specific and clearly identifiable content, a competent national authority has taken a decision on its illegality and the decision can be reviewed by an independent and impartial tribunal or regulatory body, in accordance with the requirements of Article 6 of the European Convention on Human Rights;

iii. introduce, where appropriate and necessary, provisions under national law for the prevention of intentional abuse of filters to restrict citizens' access to lawful content;

iv. ensure that all filters are assessed both before and during their implementation to ensure that the effects of the filtering are proportionate to the purpose of the restriction and thus necessary in a democratic society, in order to avoid unreasonable blocking of content;

v. provide for effective and readily accessible means of recourse and remedy, including suspension of filters, in cases where users and/or authors of content claim that content has been blocked unreasonably;

vi. avoid the universal and general blocking of offensive or harmful content for users who are not part of the group which a filter has been activated to protect, and of illegal content for users who justifiably demonstrate a legitimate interest or need to access such content under exceptional circumstances, particularly for research purposes;

vii. ensure that the right to private life and secrecy of correspondence is respected when using and applying filters and that personal data logged, recorded and processed via filters are only used for legitimate and non-commercial purposes.

Furthermore, member states and the private sector are encouraged to:

i. regularly assess and review the effectiveness and proportionality regarding the introduction of filters;

ii. strengthen the information and guidance to users who are subject to filters in private networks, including information about the existence of, and reasons for, the use of a filter and the criteria upon which the filter operates;

iii. co-operate with users (customers, employees, etc.) to improve the transparency, effectiveness and proportionality of filters.

In this context, civil society should be encouraged to follow the development and deployment of filters both by key state and private sector actors. It should, where appropriate, call upon member states and the private sector, respectively, to ensure and to facilitate all users' right to freedom of expression and information, in particular as regards their freedom to receive information without interference by public authorities and regardless of frontiers in the new information and communications environment.

COUNCIL OF EUROPE - COMMITTEE OF MINISTERS, DECLARATION ON THE INDEPENDENCE AND FUNCTIONS OF REGULATORY AUTHORITIES FOR THE BROADCASTING SECTOR (2008)

Adopted 26 March 2008

The Committee of Ministers of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress;

Bearing in mind Article 10 of the European Convention on Human Rights (ETS No. 5), guaranteeing the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers;

Recalling the importance for democratic societies of the existence of a wide range of independent and autonomous means of communication, making it possible to reflect the diversity of ideas and opinions and the absence of any arbitrary controls or constraints on participants in the information process, on media content or on the transmission and dissemination of information, as set out in the Declaration on the freedom of expression and information (29 April 1982);

Recalling its Recommendation Rec(2000)23 to member states on the independence and functions of regulatory authorities for the broadcasting sector, and its Recommendation Rec(2003)9 to member states on measures to promote the democratic and social contribution of digital broadcasting, as well as its Declaration on the guarantee of the independence of public service broadcasting in the member states (27 September 2006);

Mindful of the case law of the European Court of Human Rights and the relevant decisions of the European Commission of Human Rights, in particular when the latter states that a licensing system not respecting the requirements of pluralism, tolerance and broadmindedness, without which there is no democratic society, would infringe Article 10, paragraph 1, of the European Convention on Human Rights and that the rejection by a state of a licence application must not be manifestly arbitrary or discriminatory, and thereby contrary to the principles set out in the preamble to the Convention and the rights secured therein;

Recalling the commitment made by member states in the Political Declaration of the 7th European Ministerial Conference on Mass Media Policy (Kyiv, 10 and 11 March 2005) to undertake to ensure that the regulatory measures which they may take with regard to the media and new communication services will respect and promote the fundamental values of pluralism and diversity, respect for human rights and non-discriminatory access;

Recalling the objective of Recommendation Rec(2000)23 that, to guarantee the existence of a wide range of independent and autonomous

media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector, in order to guarantee the freedom of the media whilst at the same time ensuring a balance between that freedom and other legitimate rights and interests;

Underlining the important role played by the traditional and digital broadcasting media in modern, democratic societies in particular for informing the public, for the free formation of public opinion and the expression of ideas and for scrutinising the activities of public authorities as underlined in its Recommendation Rec(2003)9 as well as in its Declaration on the guarantee of the independence of public service broadcasting in the member states;

Noting the overview concerning the legislative framework of members states and its practical implementation, as well as legal and institutional solutions developed in particular countries regarding regulatory authorities in the broadcasting sector, and which is reproduced in the appendix hereto;

Welcoming, in this context, the situation in many Council of Europe member states where, in line with Recommendation Rec(2000)23, the independent and efficient regulation of the broadcasting sector in the public interest, as well as the independence, transparency and accountability of regulatory authorities for the broadcasting sector, is ensured by law and in practice;

Concerned, however, that the guidelines of Recommendation Rec(2000)23 and the main principles underlining it are not fully respected in law and/or in practice in other Council of Europe member states due to a situation in which the legal framework on broadcasting regulation is unclear, contradictory or in conflict with the principles of Recommendation Rec(2000)23, the political and financial independence of regulatory authorities and its members is not properly ensured, licences are allocated and monitoring decisions are made without due regard to national legislation or Council of Europe standards, and broadcasting regulatory decisions are not made available to the public or are not open to review;

Aware that a 'culture of independence', where members of regulatory authorities in the broadcasting sector affirm and exercise their independence and all members of society, public authorities and other relevant players including the media, respect the independence of the regulatory authorities, is essential to independent broadcasting regulation;

Aware that independent broadcasting regulatory authorities can only function in an environment of transparency, accountability, clear separation of powers and due respect for the legal framework in force;

Aware of the new challenges to the regulation of the broadcasting landscape resulting from concentration in the broadcasting sector and technological developments in broadcasting, in particular digital broadcasting;

I. Affirms that the 'culture of independence' should be preserved and, where they are in place, independent broadcasting regulatory authorities in member states need to be effective, transparent and accountable and therefore;

II. Declares its firm attachment to the objectives of the independent functioning of broadcasting regulatory authorities in member states;

III. Calls on member states to:

– implement, if they have not yet done so, Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, with particular reference to the guidelines appended thereto, and having regard to the opportunities and challenges brought about by political, economic and technological changes in Europe;

– provide the legal, political, financial, technical and other means necessary to ensure the independent functioning of broadcasting regulatory authorities, so as to remove risks of political or economic interference;

– disseminate widely the present declaration and, in particular, bring it to the attention of the relevant authorities, the media and of broadcasting regulatory authorities in particular, as well as to that of other interested professional and business players;

IV. Invites broadcasting regulatory authorities to:

– be conscious of their particular role in a democratic society and their importance in creating a diverse and pluralist broadcasting landscape;

– ensure the independent and transparent allocation of broadcasting licences and monitoring of broadcasters in the public interest;

– contribute to the entrenchment of a 'culture of independence' and, in this context, develop and respect guidelines that guarantee their own independence and that of their members;

– make a commitment to transparency, effectiveness and accountability;

V. Invites civil society and the media to contribute actively to the 'culture of independence', which is vital for the adequate regulation of broadcasting in the new technological environ-

ment, by monitoring closely the independence of these authorities, bringing to the attention of the public good examples of independent broadcasting regulation as well as infringements on regulators' independence.

Appendix to the Declaration by the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector

Introduction

At its 3rd meeting, in June 2006, the Steering Committee on Media and New Information Services (CDMC) discussed the implementation of non-binding instruments in its area of competence, in particular that of Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector. It asked the Secretariat to collect information with a view to assessing the situation as regards the independence and functions of regulatory authorities in the broadcasting sector in member states.

In October 2006, the Bureau of the CDMC examined a first draft document prepared by the Secretariat and decided that this draft should be reviewed with a view "to develop in greater detail the possible deficiencies in the legislative framework of member states and its practical implementation, without however naming specific countries. The second part, which includes information on the situation in the member states, should be a factual overview of legal and institutional solutions developed in particular countries regarding regulatory authorities in the broadcasting sector, using as a template the main requirements of the recommendation, providing information on whether the safeguards of the regulatory authorities' independence and functioning laid down in the recommendation are observed in practice in the particular country".

This document contains an overview on the implementation of Recommendation Rec(2000)23 and, more particularly, information on the independence of regulatory authorities in the Council of Europe member states. The document examines the legal framework and practice on broadcasting regulatory authorities and broadcasting regulation in member states and the degree of compliance with regard to the guidelines set out in Recommendation Rec(2000)23.

This overview was prepared on the basis of information provided by member states on their legal frameworks. It also takes account of information gathered from other sources which include reports by the Parliamentary Assembly, the OSCE Special Representative on Freedom of the Media, a report by the Open Society Institute on broadcasting in Europe, information provided by the European Platform of Regulatory Authorities (EPRA), as well as information from international and national non-governmental organisations.

Overview of the legislative framework of members states and its practical implementation as well as legal and institutional solutions developed in particular countries regarding regulatory authorities in the broadcasting sector

I. Legislative framework

1. According to Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector (hereafter 'the recommendation'), an appropriate legal framework is essential for the setting up and proper functioning of a broadcasting regulator. Laws and regulations should indicate clearly how and by whom members are nominated, the ways of making them accountable, how the regulatory authority is financed and what its competencies are in order to ensure the financial and political independence of the authority and its members (cf. Appendix to the recommendation, Section I, paragraphs 1 and 2).

2. All Council of Europe member states have at least some basic legal provisions on broadcasting regulation. However, not all broadcasting regulators are established by law as independent authorities, neither are all required by law to act independently.

3. Almost all member states have clear legal provisions on the financing and competencies of the regulator and the nomination of its members. A number of laws, however, do not address all relevant matters. For those states where the broadcasting sector is not regulated by an independent body but by government bodies or bodies directly under the authority of a ministry or minister, rules on independent financing or the independent nomination of members can be considered redundant. In other cases, there is no apparent reason why the law does not provide the details required by the recommendation.

4. In general, the majority of Council of Europe member states' laws on broadcasting regulation seem to provide an adequate protection for the independence of regulatory authorities. However, it would appear that, in a number of member states, the legal framework does not protect the independence of regulatory authorities as required by the recommendation. In particular, the rules on the appointment of members to the regulatory authority often do not provide members adequate protection against political pressure (see below for further details).

It has also been reported that, in a number of member states, public authorities have failed to respect the legal framework or have taken advantage of legal loopholes to interfere with the independence of the regulatory authority (see below for further details).

5. In a number of member states, laws have been described as too vague or contradictory, making it difficult for regulatory authorities to reach consistent and objective decisions. In some cases, contradictory and seemingly arbitrary decisions by the broadcasting regulator have been explained by the fact that frequent changes to the broadcasting legislation give rise to uncertainty about the legal and regulatory framework in force at a particular point in time.

6. The quantity and detail of the regulations vary considerably between member states. However, there does not seem to be a clear link between the amount of detail in a country's legislation on broadcasting regulation and the regulatory authority's independence. In fact, some of the regulatory authorities that are governed by a very limited set of rules are considered in practice to operate relatively independently. Some importance has been attributed to a 'culture of independence' where law makers, government and other players, under the scrutiny of society at large, respect the regulatory authorities' independence without being explicitly required to do so by law.

II. Appointment, composition and functioning

7. According to the recommendation (cf. the Appendix thereto, Section II, paragraph 3), the rules governing regulatory authorities in the broadcasting sector should secure their independence and protect them against any interference, in particular by political and economic interests.

8. The majority of the broadcasting regulatory authorities in Council of Europe member states are established by law as autonomous bodies. However, certain of them are government bodies or bodies directly under the authority of a ministry or minister. These regulators often depend on the administrative support of the ministry to which they are attached and seldom manage their own budget independently. In some such cases, the authorities concerned are said to succeed in working independently, usually due to a long-standing practice of independence or comprehensive regulatory frameworks which provide clear guidelines on the regulatory authorities' competences. Almost all of the authorities which are not formally established as autonomous agencies but which are reported to work independently in practice seem to be found in long-standing democracies with relatively low levels of corruption, where the transparency of public bodies in general is ensured and where independent media and a vibrant civil society keep the regulatory authority's work under close scrutiny.

9. To guarantee the independence of members of regulatory authorities from political and economic pressure, the recommendation calls on member states to ensure that regulatory bodies have incompatibility rules, preserving their members from being under the influence of political powers or prohibiting them from holding interests in enterprises of other organisations in the media or related sectors (cf. Appendix to the Recommendation, Section II, paragraph 4).

10. Most Council of Europe member states have rules that prohibit members of regulatory authorities from holding political office; the number of states that also ban them from having commercial interests in the media sector is lower. Indeed, in certain cases, the incompatibility rules for members of regulatory authorities go beyond the guidelines appended to the recommendation and members of regulatory authorities are not permitted to work in the media business or engage in politics for several years after the expiry of their mandate. To prevent members from signing over their commercial interests in a media business to a family member, the law in some member states also requires that close relatives of members give up commercial interests in the media. This requirement extends on occasion to relatives holding political office.

However, in other member states, the framework seeking to guarantee the independence of members of regulatory authorities is far less satisfactory and, in many cases, incompatibilities do not extend to potentially conflicting relations with or interests in media businesses or politics.

11. In certain Council of Europe member states, the members of regulatory authorities have the

power to decide over a member's possible conflict of interest, or a member can choose not to make use of his or her voting rights, should personal interests be at stake in a regulatory decision. Another practice is for the other members to decide to exclude a member in case of proven conflict of interest.

12. To guarantee the integrity of the members of regulatory authorities, the recommendation calls for rules designed to ensure that members of regulatory authorities are appointed in a democratic and transparent manner (cf. Appendix to the recommendation, Section II, paragraph 5).

13. In most Council of Europe member states, the members of regulatory authorities are appointed by the parliament or by the head of state at the proposal of parliament. In some member states, in order to ensure that the membership of the regulatory authority reflects the country's social and political diversity, part or all of the members are nominated by non-governmental groups which are considered to be representative of society. Further, in a few member states, the law provides objective selection criteria for the appointment of members.

By contrast, in a number of countries, members are appointed by sole decision of one state authority, e.g. the head of state or a state department, often without clearly specified selection criteria. The appointment of members of regulatory authorities by the head of state and/or parliament has sometimes been criticised advancing that, in such cases, membership would represent or reproduce political power structures.

14. Concerns have often been raised that the nominating or appointing bodies could exert pressure on the members after their appointment. In fact, in some member states, the members of regulatory authorities are frequently accused of acting on behalf of the state body that designated them or political formation behind the designating or appointing authority.

15. To avoid that dismissal be used as a means of political pressure, the recommendation calls for precise rules on the possibility to dismiss members. Accordingly, dismissal should only be possible in case of non-respect of the rules of incompatibility, duly noted incapacity to exercise a member's functions and conviction (by a court of law) for a serious criminal offence. An appeal before the competent courts should be possible against any dismissal (see Appendix to the recommendation, Section II, paragraphs 6 and 7).

16. Whereas in a majority of member states regulations exist on the dismissal of members, they are not always limited to the list of justifications for dismissal provided for by the recommendation. In a number of member states, the law stipulates that members of regulatory authorities can be dismissed if convicted of an offence, but it is not always specified that this has to be a serious offence as opposed to a minor or administrative offence.

17. In some member states, to avoid dismissal procedures being used as a means of exerting pressure on members, members of regulatory authorities cannot be dismissed at all. This practice has apparently given rise to concern in at least one member state, where members could not be held accountable and dismissed for licensing decisions that were allegedly in violation of national law.

III. Financial independence

18. Another key factor for ensuring the independence of regulatory authorities is their funding arrangements, which, according to the recommendation, should be specified in law in accordance with a clearly defined plan, and with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently (cf. Appendix to the recommendation, Section III, paragraphs 9 to 11).

19. The majority of Council of Europe member states have legal provisions defining the source of funding of the regulatory body. By contrast, in at least a quarter of member states, the legal framework does not appear to be clear on this subject.

20. It is common practice amongst many regulatory authorities in Council of Europe member states to receive their funding directly through fees in order to be independent from public authorities' decision making. Nonetheless, the laws of a large number of member states specify that the regulatory authority is to be financed by the state budget. In some member states, the law mentions clearly that public authorities must not use their financial decision-making power to interfere with the independence of the regulatory authority; however in most countries where the regulatory authority is financed by the state budget no such precautions are laid down in the law.

21. In some member states, the law stipulates that the regulatory authority proposes its annual budget plan which then has to be automatically approved by a specific state body (or the approval of such a body being a formality). However, in at least a third of all Council of Europe

member states, no clear rules exist to ensure that the approval for the regulatory authority's funding is not up to the discretion of such other state bodies.

22. It would appear that, despite the law envisaging an independent funding plan for the regulatory authority, in certain Council of Europe member states those authorities claim to feel under threat of or have experienced pressure from governments which go back on agreed funding plans and/or use funding decisions as leverage in political power struggles.

Reportedly, in more than one case, broadcasting regulatory authorities which, according to the law should be financed independently, in practice received their revenue from the state because of a weak broadcasting market or because the licence fee collecting system was ineffective. In at least two member states, the regulatory authority did not publicly disclose the source of their revenue after the licence fee system had collapsed.

23. In addition, many regulators also complain that they are not given the means (in particular human resources) to adequately perform their duties (see below for further details).

IV. Powers and competence

24. According to the recommendation, the legislator should entrust the regulatory authority with the power to adopt regulations and guidelines concerning broadcasting activities as well as internal rules (cf. Appendix to the recommendation, Section IV, paragraph 12).

25. In a significant number of Council of Europe member states, the law clearly stipulates that regulatory authorities have the power to adopt regulations and guidelines concerning broadcasting activities and have the power to adopt internal rules. However, in at least a quarter of the member states, the legal framework does not foresee such rights. In at least two member states, these powers are in fact expressly vested upon another body or authority.

26. An essential task of the broadcasting regulatory authority should be the granting of licences. The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner and decisions should be made public. Calls for tenders should also be made public, should define a number of conditions to be met by the applicants and specify the content of the licence application (cf. Appendix to the recommendation, Section IV, paragraph 13 to 17).

27. The above-mentioned requirements are fully met in some Council of Europe member states and partially in many of them. In particular, the majority of regulatory authorities in Council of Europe member states are given the competence to award broadcasting licences. However, in at least one fifth of all member states, a body other than a broadcasting regulator awards broadcasting licences. Further, the legislation of not less than nine member states fail to define clearly the basic conditions and criteria for the granting and renewal of broadcasting licences.

28. In almost half of all Council of Europe member states, tender procedures are insufficiently detailed. It would appear that, in at least 18 member states, there are no legal provisions requiring that the licence tendering process be public. In a comparable number of member states, the law does not specify on the selection criteria to be met by applicants for licences. Again, in almost one in two member states, the legal framework is either silent or provides insufficient detail on the content of licence applications.

29. Even though licensing decisions are often criticised, the majority of regulatory authorities seem to award licenses in a manner which is consistent with the recommendation. Nevertheless, in a number of Council of Europe member states, the broadcasting licensing procedure allegedly lacks transparency, is arbitrary or politically biased. It is claimed that, in many cases, this is due to a lack of regulations and licence selection criteria, and frequent revisions of the law apparently add to the confusion.

30. In addition, some broadcasting authorities have not been able to enforce the law when allocating licenses, because regulations were not clear as to the distribution of competences in the licensing process or because broadcasting regulators were not given the authority and/or financial means to establish or to implement an effective licensing system.

31. Another essential function of regulatory authorities should be the monitoring of broadcasters' compliance with their commitments and obligations. Regulatory authorities should have the power to consider complaints and there should be no *a priori* monitoring. Regulatory authorities should have the power to impose sanctions in cases of violations. The sanctions have to be defined by law and should start with a warning (cf. Appendix to the recommendation, Section IV, paragraphs 18 to 23).

32. The laws in almost all Council of Europe member states envisage an independent body to monitor broadcasters' compliance with the law and with licence conditions. This task is usually entrusted to the regulatory body that awards licenses although, in some countries, the law creates a separate independent authority for that purpose. There are, however, some member states where organs that are under the direct authority of or answerable to governmental authorities are vested with monitoring duties.

33. Hardly any of the legislations in member stipulate clearly that monitoring should be conducted only after broadcasting, although practice is broadly in compliance with this requirement.

34. In most member states, regulatory authorities are empowered to impose sanctions as prescribed by law. However, in at least seven member states, there are either no provisions on the body that would enforce sanctions or this function is carried out directly by government bodies or authorities.

Many member states give details on the sanctions that can be handed down in cases of violations of the laws or licence requirements. However, the lower end of the scale is not always a warning. Further, in a small number of member states, the law contains no details on possible sanctions.

It might be added that, only in about one quarter of Council of Europe member states, the law explicitly allows monitoring bodies to consider third party complaints concerning broadcasters' activities.

35. Almost all regulatory authorities in Council of Europe member states are by law required to monitor the respect of licence conditions. Many regulators have performed their monitoring duties successfully for many years, interpreting and developing licence requirements, on occasion in cooperation with broadcasters, in order to best protect the rules defined in national legislation. A significant number of bodies, however, allegedly monitor insufficiently or not at all because they do not have the necessary financial or human resources to do so.

36. On a number of occasions, regulators have been accused of applying sanctions arbitrarily or inconsistently. Further, in a few countries, complaints have been made that the sanctions were too harsh or too lax, motivated by archaic moral ideas or that they were politically motivated. This has apparently been due to vague licence conditions or broadcasting requirements with regulators being uncertain about how to interpret those conditions. It has also been argued that some regulatory authorities do not have the political support or are not given the means to enforce sanctions.

V. Accountability

37. In its final part (cf. Appendix to the recommendation, Section V, paragraphs 25 to 27), the recommendation states that regulatory authorities should be accountable to the public for their activities, for example by means of publishing annual reports. The recommendation also underlines that regulatory authorities should make their decisions public and should only be supervised in respect of the lawfulness of their activities and the correctness and transparency of their financial activities.

38. In many member states, regulatory authorities are accountable to state bodies or authorities, for example the parliament, the head of state or the auditing authorities. By contrast, broadcasting regulatory authorities are accountable by law to the public in only a few cases. That said, in at least eight Council of Europe member states, the law clearly requires regulatory authorities to make their decisions public, while many other legal frameworks are silent on these issues.

In at least eight of the member states where the law prescribes that regulatory authorities are accountable to a state body or to the public, the legal framework does not specify clearly that the regulatory authorities can only be supervised in respect of the lawfulness of their activities and the correctness and transparency of their financial activities. Moreover, in a number of member states, regulatory authorities cannot be held accountable by law to anyone.

39. In approximately half of the Council of Europe member states, the law prescribes that decisions of the broadcasting regulator are open to review (usually by a court of justice). However, in other member states, decisions cannot be challenged before the courts.

40. The majority of regulatory bodies in Council of Europe member states publish their decisions in annual reports. In some countries where regulatory bodies are accountable by law to parliament and/or the head of state, it has been alleged that annual reports were rejected and regulatory authorities dissolved not on objective grounds but for political reasons.

COUNCIL OF EUROPE – MINISTERS RESPONSIBLE FOR MEDIA AND NEW COMMUNICATIONS SERVICES, POLITICAL DECLARATION AND RESOLUTION – A NEW NOTION OF MEDIA?

Adopted on 28 and 29 May 2009, Reykjavik, Iceland

Political declaration

The ministers of states participating in the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, held in Reykjavik on 28 and 29 May 2009, make the following political declaration:

1. Free, independent and diverse media are essential for a democratic society. This is why the Council of Europe has developed a large body of standards over the years that seek to protect the media from interference, in compliance with Article 10 of the European Convention on Human Rights (ETS No. 5). Those standards also explore duties and responsibilities which equally stem from Article 10. Thanks to constant review and updating, their relevance has persisted over the years, even in a changing media landscape.

2. The ways in which information is gathered, content is created and the methods by which both are made available and sought have changed with technological developments. Users have ready access to, and create content for, means of mass communication which employ diversified communication platforms for both existing and newly developed media or comparable media-like mass-communication or information services. The relations between the media or other providers of those services and users or consumers have also evolved. It is therefore an opportune moment to review the notion of the media, understood as certain forms of mass communication that are transmitted by means of print or broadcasting involving ethical standards and editorial responsibility.

3. Like traditional media, new providers of media-like mass-communication services also should strive to promote and respect certain fundamental values. New modes of content creation and expression as well as seeking and imparting information in a mass-communication setting reinforce but may also challenge fundamental rights and freedoms. Existing media-related standards that were developed for traditional forms of mass communication may well apply to new services and service providers. However, additional tailored guidance to member states may be necessary. Further, new service providers should be made aware of their rights and also their duties and responsibilities.

4. Public service media, having genuine editorial independence and institutional autonomy,

contribute to media diversity and help counterbalance the risk of misuse of power in a situation of strong concentration of the media and new communication services. They are therefore a fundamental component of the media landscape in our democratic societies. However, in a changing environment, public service media face major challenges which may threaten their very survival. Reflection on possible responses to these challenges should be pursued.

5. Growing numbers of people rely on the Internet as an essential tool for everyday activities (communication, information, knowledge, commercial transactions, leisure), ultimately improving their quality of life and well-being. People therefore expect Internet services to be accessible and affordable, secure, reliable and ongoing. Access to these services also concerns the enjoyment of human rights and fundamental freedoms, as well as the exercise of democratic citizenship. Council of Europe member states might therefore explore together the follow-up to be given to the Committee of Ministers' Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet.

6. Media or media-like services have growing cross-border importance. The revision of the

European Convention on Transfrontier Television (ETS No. 132) is a welcome Council of Europe response to the diversification of communication platforms and information services. The revision process should be completed at the earliest opportunity. A broader legal response to the need to protect the cross-border flow of media and media-like content and, more generally, Internet traffic should be explored having regard to Article 10 of the European Convention on Human Rights. Steps may also be required to ensure that critical infrastructure and resources, which are essential for people's access to Internet services, are preserved in the public interest.

7. The question of the dignity of persons exposed to or affected by media or media-like services

should be central to developing standards for those services. In this context, particular attention should be paid to children, young people and other groups with special needs or characteristics.

Access by all these groups to media and media-like services is an important matter. Gender-related issues should also be mainstreamed with regard to these services. Users should be empowered to participate actively in the new communication environments, aware of their rights and responsibilities and adequately protected from possible harm.

8. In the interest of the required protection of the right to private life, the processing of personal data in new communication and information environments, and more particularly on the Internet, also needs to be addressed, including profiling practices.

9. There is ongoing concern about the effective implementation of Council of Europe standards on the freedom of expression and information and the freedom of the media. This implementation requires careful follow-up in the context of technological developments and market conditions. Threats derive also from crisis situations, be it terrorism, war or financial turmoil, as well as technological developments and market conditions which affect the position of journalists in information processes.

There is, in particular, growing concern about the impact of terrorism, and of actions taken by member states to combat it, on those freedoms. Efforts have to be redoubled to ensure that these freedoms, underpinned by the rule of law, do not fall victim to these circumstances. Respect for Council of Europe standards on freedom of expression and information as well as freedom of the media in practice should therefore be an ongoing endeavour.

10. In light of the above, the ministers:

Agree to pursue co-operation on media and new communication services with a view to providing common responses to developments regarding the media and the provision of media-like services, in particular as regards the respect for freedom of expression and information, the right to private life and the dignity of human beings;

Adopt the resolution "Towards a new notion of media" and the corresponding action plan, and the specific resolutions on "Internet governance and critical Internet resources" and the "Developments in anti-terrorism legislation in Council of Europe member states and their impact on freedom of expression and information" which are appended to this political declaration and request the Committee of Ministers of the Council of Europe to take steps to implement the actions mentioned in those documents;

Ask the Committee of Ministers of the Council of Europe to continue to explore ways of enhancing the respect for freedom of expression and information and freedom of media standards in practice.

Resolution - Towards a new notion of media

1. The purpose of media or comparable media-like mass communication services remains on the whole unchanged, namely the provision or dissemination of information, analysis, comment, opinion and entertainment to a broad public. The underlying objectives also remain comparable: to provide news, information or access to information; to set the public agenda; to animate public debate or shape public opinion; to contribute to development or to promote specific values; to entertain; or to generate an income or, most frequently, a combination of the above.

2. However, the content itself is evolving due to the way in which information is gathered and content is created, disseminated or distributed, sought, selected and received. This is due both to technical reasons, related to the communication platforms used, and to the presentation of content, which offers a perception of enhanced choice and interaction. In terms of income, new business models have been developed for associating revenue-generating activities to the dissemination of content through the means of mass communication.

3. These developments call for an in-depth analysis of our understanding of media, including the criteria and assumptions that underlie this understanding. It would therefore be desirable to explore the notion of media and, if necessary, review the concept itself. This would permit the establishment of criteria for distinguishing media or media-like services from new forms of personal communication that are not media-like mass-communication or related business activities.

4. Fundamental rights and freedoms and other Council of Europe values and standards, in

particular the right to freedom of expression and information and its corollary freedom of the me-

dia, have to be promoted and protected, regardless of changes in the media and media-like landscape. The freedom of expression and information also carries with it certain duties, responsibilities and, in certain cases, can be subject to restrictions which are prescribed by law and necessary in a democratic society. Consequently, all media and media-like service providers have to respect certain benchmarks, and they should be adequately informed of their responsibilities.

5. Within an intergovernmental co-operation framework, the Council of Europe should consider the extent to which requirements of media or journalistic professionalism, editorial independence and editorial responsibility apply or should apply to new services or to media-like service providers. If appropriate, it should also provide guidance on the modalities of application of those standards to the operators of new services and business activities. More generally, it should explore whether and how Council of Europe standards that were developed with traditional forms of mass communication in mind apply to the new services or service providers. Those standards may have to be adapted, or new ones will have to be elaborated, for the new media-like service providers.

6. As for traditional media, self-regulation should be a key element for ensuring compliance with standards while respecting editorial independence; where necessary, self-regulation can be supported or underpinned by co-regulation. As a form of interference, regulation should be subject to the limits and conditions established by the European Convention on Human Rights and the relevant case law of the European Court of Human Rights and meet the tests elaborated by the latter. Media or medialike regulatory or accountability mechanisms, whether self- or co-regulatory or, if necessary, state driven, must be effective, transparent, independent and accountable. The Council of Europe should explore how to improve the functioning of those mechanisms, in particular how to improve the access

to those mechanisms for persons or groups who consider that their rights have been breached by media or media-like service providers.

7. A people-centred approach also requires that individuals are allowed to exercise their right to free expression and information and use new communication services to participate in social, political, cultural and economic life and to do so without infringing the human dignity or the rights of others. The Council of Europe, in consultation and co-operation with relevant stakeholders, should provide member states with guidance, benchmarks and tools for the media and media-like mass communication service providers that allow individuals to seek, create and distribute information without fearing breaches to their own human dignity or rights. The question of how rights and responsibilities should be apportioned in appropriate cases between the content creator and the distributor or service provider should also be explored.

8. In this context, media literacy should be considered essential. It should be recognised as part of the education for democratic citizenship. It is a particularly important tool in optimising children's and young people's comprehension, critical thinking, citizenship, creativity and critical awareness of the media. Their sense of responsibility when they create, use and distribute content is of key importance. Member states will also have to address other threats to children's dignity, security and privacy, in particular the question of the removal of content that children and young people create or place on the Internet and that challenges their dignity, security and privacy or otherwise renders them vulnerable now or at a later stage in their lives.

9. It is also necessary to explore whether and to what extent data retention, the processing of personal data and profiling techniques or practices challenge unrestricted participation and people's rights to freedom of expression and information and other fundamental rights. Appropriate guidance should be provided to protect users' rights.

10. The plurality of sources of information and media and media-like services has to be ensured. Individuals' right to receive information can be challenged and democracy can be threatened by negative and significant market distortion as a result of media concentration; lack of diversity and pluralism; manipulative messages; new forms of content aggregation; the management and prioritisation of flow of content and of access and limited connectivity, or lack of access, to broadband services. Measures have to be proposed to address these risks. Part of the answer lies in the recognition of the public service value of the Internet and the resulting responsibilities for states.

11. Another important element for ensuring access to trustworthy sources of information is

genuine, independent and adequately resourced public service media. At present, not all Council of Europe member states offer public service media that are able to attract and to serve all segments of society and contribute to people's full participation in political, social and cultural life. Developing the role of public service media may well involve public expenditure on cutting-edge media and media-like services and technologies. The modalities of expenditure on public media or information services may also need to be reviewed. The Council of Europe could provide a forum for discussion and, where appropriate, propose guidance on the manner in which public service media can discharge its duties, including by exploring innovative governance approaches.

12. We therefore:

Affirm the relevance of Council of Europe values, principles and standards for the media and medialike actors that operate within an evolving landscape of media services and information and communication technologies, and the need to explore the desirability of adapting existing and/or developing new standards or regulatory frameworks;

Agree to explore, in close co-operation with media professionals, in particular journalists, the roles and responsibilities they may have in the context of the provision of media or media-like services in the new information and communication environments;

Reaffirm our support for technology-neutral public service media, including public service

broadcasting, which enjoy genuine editorial independence and institutional autonomy;

Reaffirm the importance of copyright protection and acknowledge the need to explore further, in close co-operation with relevant stakeholders, issues deriving from the use of copyrighted material or the exploitation of user-generated content by media-like services to protect and promote the freedom of expression and information;

Undertake to continue to resolutely support Council of Europe standard-setting work in the fields of freedom of expression and information and freedom of the media and to provide political backing to ensure that those freedoms are upheld as individual human rights and as essential components of a democratic society;

Acknowledge the need to put particular emphasis on ensuring the rights of children, young people and other groups with special needs or characteristics in the process of developing standards for media and media-like services;

Recognise the need to promote the implementation and respect of Council of Europe standards on freedom of expression and information and freedom of the media, and the positive impact that such efforts could have in the new information and communications environments;

Reiterate our support for action, within a Council of Europe context, to enhance users' media literacy so that they are able to express and inform themselves in a manner which makes them critical, competent and responsible when using media and media-like services;

Agree on the need to remain attentive to the risks involved in a situation of strong concentration of media and media-like mass-communication services, and to the role of those services, including public service and community media, in facilitating intercultural dialogue and promoting a culture of tolerance in multicultural societies;

Adopt the action plan set out below and request the Committee of Ministers of the Council of Europe to take all necessary steps to facilitate its implementation, acknowledging that this is a continuation of work carried out from the previous European Ministerial Conferences on Mass Media Policy.

Action Plan

I. Towards a new notion of media and its consequences

1. Examine whether our understanding of media and mass-communication services remains valid in the new information and communications environment. If appropriate, elaborate a policy document reviewing the concept of media itself to include relevant new media and media-like mass communication services and service providers.

2. Having regard to the results from this review, establish criteria for distinguishing media or media-like services from other forms of personal communication.

3. Examine whether and how the requirements of journalistic professionalism, editorial

independence and editorial responsibility apply or should apply to operators of new media and medialike mass-communication services and service providers.

4. In consultation with relevant stakeholders, examine the need for, the modalities (such as self-regulation, co-regulation or regulation) and the subject of regulatory activities required to ensure respect for Council of Europe values in the framework of new media and media-like mass communication services. If appropriate, provide guidance as to the application of existing Council of Europe standards to these new services.

II. Public service

5. Pursue work on the role of public service media in a democratic society. In particular, examine the modalities for delivery to the widest possible public, including young audiences, of trustworthy, diverse and pluralistic media and media-like services, paying attention to the way in which information and media or media-like services are sought and received and to the challenges of obtaining quality or trustworthy content.

6. In this connection, explore and, if appropriate, elaborate a policy document containing

guidance for member states on governance approaches for public service media that will contribute to achieving the above objectives. This could extend to reflecting on other (organisational, financial and technical) features of the public service provision of media and media-like services.

7. Continue to develop the notion of the public service value of the Internet. In this context,

explore the extent to which universal access to the Internet should be developed as part of member states' provision of public services. This may include policies for redressing market failure where market forces are unable to satisfy all legitimate needs or aspirations, both in terms of infrastructure and the range and quality of available content and services.

III. The individual and the media and media-like mass-communication services

8. Explore how newer or emerging modes of mass dissemination of and access to content, and the associated retention, processing and exploitation of data, affect the rights protected under Article 10 of the European Convention on Human Rights. If necessary, give guidance on how to strengthen the protection of those rights.

9. Examine how the status and rights of creators or providers of content can change, in particular when others associate that content to their own media or media-like services or income-generating activities (for example, advertising) in a mass-communication environment. If appropriate, elaborate guidance on the matter, including on the legal control of creators and providers over their content and the attribution of responsibility (such as when legal liability arises from the broad dissemination of such content).

10. Pursue reflection on possible means of ensuring the effective, transparent, independent and accountable operation and functioning of complaints bodies and procedures for media and media-like mass-communication services.

11. In consultation with relevant stakeholders, including education specialists, pursue work on media literacy with the aim of making users, creators and distributors of content (in particular children and young people) responsible, informed and critical participants in the information society. Attention should be paid, as appropriate, to non-formal education as well as to the role of media themselves.

12. Continue to address other challenges to individuals' (in particular children's and young

people's) rights to freedom of expression and information, privacy and other fundamental rights, as well as to their dignity and security on the Internet. In particular, explore possibilities for the removal of content that children create or place on the Internet. Pursue standard-setting work on the processing of personal data and profiling techniques or practices, explore common standards on privacy settings and examine the threats that could derive from systems designed to identify and track objects. In consultation with relevant stakeholders, develop appropriate guidance, benchmarks and tools to protect users' rights.

13. Explore the question of the possible use of newer or emerging services of mass

communication to shape opinion and consumption of different groups in society in a surreptitious, subliminal or otherwise manipulative manner and, with due regard to Articles 8 and 10 of the European Convention on Human Rights, explore ways in which to protect the users or public from such use.

COUNCIL OF EUROPE – COMMITTEE OF MINISTERS, RECOMMENDATION CM/REC(2009)5 ON MEASURES TO PROTECT CHILDREN AGAINST HARMFUL CONTENT AND BEHAVIOUR AND TO PROMOTE THEIR ACTIVE PARTICIPATION IN THE NEW INFORMATION AND COMMUNICATIONS ENVIRONMENT

Adopted on 8 July 2009

1. Protecting freedom of expression and human dignity in the information and communications environment by ensuring a coherent level of protection for minors against harmful content and developing children's media literacy skills is a priority for the Council of Europe.

2. The risk of harm may arise from content and behaviour, such as online pornography, the degrading and stereotyped portrayal of women, the portrayal and glorification of violence and self-harm, demeaning, discriminatory or racist expressions or apologia for such conduct, solicitation (grooming), the recruitment of child victims of trafficking in human beings, bullying, stalking and other forms of harassment, which are capable of adversely affecting the physical, emotional and psychological well-being of children.

3. Attention should be drawn to the normative texts adopted by the Committee of Ministers designed to assist member states in dealing with these risks and, as a corollary, in securing everyone's human rights and fundamental freedoms. These texts include Recommendation CM/Rec(2008)6 on measures to promote the respect for freedom of expression and information with regard to Internet filters; the 2008 Declaration on protecting the dignity, security and privacy of children on the Internet; Recommendation CM/Rec(2007)11 on promoting freedom of expression and information in the new information and communications environment; Recommendation Rec(2006)12 on empowering children in the new information and communications environment; and Recommendation Rec(2001)8 of the Committee of Ministers on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services).

4. There is a need to provide children with the knowledge, skills, understanding, attitudes, human rights values and behaviour necessary to participate actively in social and public life, and to act responsibly while respecting the rights of others.

5. There is also the need to encourage trust and promote confidence on the Internet, in particular by neutral labelling of content to enable both children and adults to make their own value judgments regarding Internet content.

6. The Committee of Ministers recommends that member states, in co-operation with private sector actors and civil society, develop and promote coherent strategies to protect children against content and behaviour carrying a risk of harm while advocating their active participation in and best possible use of the new information and communications environment, in particular by:
– encouraging the development and use of safe spaces (walled gardens), as well as other tools facilitating access to websites and Internet content appropriate for children;
– promoting the further development and voluntary use of labels and trustmarks allowing parents and children to easily distinguish non-harmful content from content carrying a risk of harm;
– promoting the development of skills among children, parents and educators to understand better and deal with content and behaviour that carries a risk of harm;
– bringing this recommendation and its appended guidelines to the attention of all relevant private and public sector stakeholders.

Appendix to Recommendation CM/Rec(2009)5

Guidelines

I. Providing safe and secure spaces for children on the Internet

7. The development of new communication technologies and the evolution of the Internet have led to a vacuum in appropriate measures to protect children against content carrying a risk of harm. While the protection against content in the offline world is, in most cases, much easier to guarantee, it has become significantly more difficult to do so in the online world, especially considering that every action to restrict access to content is potentially in conflict with the right to freedom of expression and information as en-

shrined in Article 10 of the European Convention on Human Rights (ETS No. 5). It should be recalled that this fundamental right and freedom is a primary objective of the Council of Europe and its member states; at the same time states also have a legitimate right, and even an obligation, to protect children from content which is unsuitable or inappropriate.

8. While parental responsibility and media education are of primary importance in effectively protecting children, there are also tools and methods which can assist parents and educators in their efforts to inform and guide children about the Internet and Information and Communication Technologies (ICTs). The provision of safe and secure spaces (walled gardens) for children on the Internet and the Council of Europe's online game "Through the Wild Web Woods" are notable examples of such tools and methods.

9. On this basis, member states, in co-operation with the private sector, the media and civil society, are encouraged to develop safe and secure spaces on the Internet for children safely to explore and participate actively in the information society, in particular by:

– creating safe and secure websites for children, for example by developing age-appropriate online portals;

– developing professional standards for the maintenance of such Internet websites and portals, particularly with regard to links and references to other sites;

– raising awareness of these safe and secure Internet websites for children, in particular among parents, educators, content developers and their respective associations;

– considering the integration of the benefits of these safe and secure Internet websites in school curricula, and in educational materials such as "The Internet literacy handbook", a Council of Europe publication.

II. Encouraging the development of a pan-European trustmark and labelling systems

10. There is an increasing demand for systems which help to protect children from content carrying a risk of harm. The development of Internet content filters has provided one form of protection which subsequently led to the adoption of Recommendation CM/Rec(2008)6 of the Committee of Ministers on measures to promote the respect for freedom of expression and information with regard to Internet filters.

11. Apart from automated content rating and filtering, there are initiatives which exist to label online content on a voluntary basis and labelling which is performed by the content creator. Among them, the Internet Content Rating Association (part of the Family Online Safety Institute (FOSI)) and PEGI Online (part of the Pan-European Game Information (PEGI) plus system), both of which have led to the development of systems which promote descriptions of online content.

12. The labelling of online content contributes to the development of safe and secure spaces for children on the Internet. However, the effectiveness and trustworthiness of labelling systems greatly depend on the accountability of those responsible for these systems and their interoperability. The development of a pan-European trustmark for responsible labelling systems – prepared in full compliance with the right to freedom of expression and information in accordance with Article 10 of the European Convention on Human Rights – would enhance these systems and initiatives, facilitate the provision of safe and secure spaces for children on the Internet and avoid and/or mitigate their exposure to content and behaviour carrying a risk of harm.

13. Online content which is not labelled should not however be considered dangerous or less valuable for children, parents and educators. Labelling has limited scope and should be seen as one possibility, among others, to promote the democratic participation and protection of children on the Internet in countering content and behaviour that carry a risk of harm.

14. On this basis, member states, in co-operation with the private sector, the media and civil society, are encouraged to develop and promote the responsible use of labelling systems for online content, in particular in:

– creating a pan-European trustmark for labelling systems of online content. Criteria for this trustmark would include:

- adherence to human rights principles and standards, including the right to provide for effective means of recourse and remedy, for example the possibility to re-assess labelling when users and/or creators/authors of online content claim that content has been incorrectly labelled;

- labelling systems are provided and used on a voluntary basis, both by creators/authors and users;

- the inadmissibility of any form of censorship of content;
- respect for the editorial independence of media and media-like online content services;
- regular review of the labelled content, for example by introducing a maximum length of time of the validity of the label;
– promoting initiatives for the interoperability of labelling systems, including the creation of a unique pan-European logo which signals the suitability of content for different age groups;
– developing principles for the age-appropriate rating of content, taking into account the different traditions of member states;
– promoting research and development, in particular as regards the possibility to label content through metadata;
– raising awareness among parents and educators about the advantages of labelling content in order to facilitate access to safe and secure spaces for children on the Internet;
– assessing and evaluating labelling systems and their effectiveness, in particular with regard to their compliance with Article 10 of the European Convention on Human Rights and the accessibility and affordability of the services emanating from these systems for the general public.

III. Promoting Internet skills and literacy for children, parents and educators

15. Safe and secure spaces on the Internet and the labelling of online content can contribute to making the use of the Internet an enjoyable and confidence-building experience for children. It should, however, be accepted that it is not possible to eliminate entirely the danger of children being exposed to content or behaviour carrying a risk of harm, and that consequently media (information) literacy for children, parents and educators remains a key element in providing coherent protection for children against such risks.

16. On this basis, member states, in co-operation with the private sector, associations of parents, teachers and educators, the media and civil society, are encouraged to promote media (information) literacy for children, young people, parents and educators, in order to prepare them for possible encounters with content and behaviours carrying a risk of harm, in particular by:
– raising awareness and developing critical attitudes about both the benefits and risks for children freely using the Internet and ICTs;
– adapting school curricula to include practical learning about how best to use the Internet and ICTs, and encouraging teachers to analyse and counter sexism in online content which shapes children's attitudes;
– informing children, parents and educators about safe and secure spaces on the Internet and trustworthy labels for online content;
– fostering knowledge and practical understanding of the human rights dimensions of labelling systems and filtering mechanisms, and their potential risks to freedom of expression and information, inter alia by drawing the attention of all relevant stakeholders to the Council of Europe's standard-setting instruments and tools in this field.

COUNCIL OF EUROPE – PARLIAMENTARY ASSEMBLY, RECOMMENDATION 1950 (2011) ON THE PROTECTION OF JOURNALISTS' SOURCES

Adopted on 25 January 2011

1. The Parliamentary Assembly recalls that the free exercise of journalism is enshrined in the right to freedom of expression and information, which is guaranteed by Article 10 of the European Convention on Human Rights ("the Convention", ETS No. 5). This right constitutes the foundation of a democratic society and an indispensable requirement for its progress and the development of every individual. Free, independent and pluralist media are a necessary condition of any true democratic society. Democracy and good governance require accountability and transparency and, in this respect, media play an essential role in the public's scrutiny of public and private sectors in society.

2. Recalling Committee of Ministers Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information, the Assembly reaffirms that the protection of journalists' sources of information is a basic condition for both the full exercise of journalistic work and the right of the public to be informed on matters of public concern, as expressed by the European Court of Human Rights in its case law under Article 10 of the Convention.

3. The Assembly notes with concern the large number of cases in which public authorities in Europe have forced, or attempted to force, journalists to disclose their sources, despite the clear standards set by the European Court of Human Rights and the Committee of Ministers. These violations are more frequent in member states without clear legislation. In cases of investigative journalism, the protection of sources is of even greater importance, as stated in the Committee of Ministers' Declaration of 26 September 2007 on the protection and promotion of investigative journalism.

4. Referring to the new Press and Media Law of Hungary (Law CIV of 2010 on the freedom of the press and the fundamental rules on media content), the Assembly expresses its concern that limits to the exercise of media freedom fixed by Article 4.3 and the exceptions to the right of journalists not to disclose their sources stipulated in Article 6 of this law seem to be overly broad and thus may have a severe chilling effect on media freedom. This law sets forth neither the procedural conditions concerning disclosures nor guarantees for journalists requested to disclose their sources. The Assembly calls on the Government and Parliament of Hungary to amend this law, ensuring that its implementation cannot hinder the right recognised by Article 10 of the Convention.

5. Public authorities must not demand the disclosure of information identifying a source unless the requirements of Article 10, paragraph 2, of the Convention are met and unless it can be convincingly established that reasonable alternative measures to disclosure do not exist or have been exhausted, the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, and an overriding requirement of the need for disclosure is proved.

6. The disclosure of information identifying a source should therefore be limited to exceptional circumstances where vital public or individual interests are at stake and can be convincingly established. The competent authorities, requesting exceptionally the disclosure of a source, must specify the reasons why such vital interest outweighs the interest in the non-disclosure and whether alternative measures have been exhausted, such as other evidence. If sources are protected against any disclosure under national law, their disclosure must not be requested.

7. Recalling Recommendation Rec(2003)13 of the Committee of Ministers on the provision of information through the media in relation to criminal proceedings, the Assembly reaffirms that the public must be able to receive information through the media about the activities of police services and judicial authorities, including court proceedings of public interest, as far as this does not prejudice the presumption of innocence of the suspect or accused under Article 6 of the Convention, the right to privacy under Article 8 of the Convention or the secrecy of investigations and police inquiries.

8. The right of journalists not to disclose their sources applies also to sources from within the police or judicial authorities. Where such provision of information to journalists was illegal, police and judicial authorities must pursue internal investigations instead of asking journalists to disclose their sources.

9. In so far as Article 10 of the Convention protects the right of the public to be informed on matters of public concern, anyone who has knowledge or information about such matters should be able to either post it confidentially on third-party media, including Internet networks, or submit it confidentially to journalists.

10. With regard to the right of every person to disclose confidentially to the media, or by other means, information about unlawful acts and other wrongdoings of public concern, the Assembly recalls its Resolution 1729 (2010) and Recommendation 1916 (2010) on the protection of "whistle-blowers" and reaffirms that member states should review legislation in this respect to ensure consistency of domestic rules with the European standards enshrined in these texts.

11. In the same manner as the media landscape has changed through technological convergence, the professional profile of journalists has changed over the last decade. Modern media rely increasingly on mobile and Internet-based communication services. They use information and images originating from non-journalists to a larger extent. Non-journalists also publish their own or third-party information and images on their own or third-party Internet media, accessible to a wide and often undefined audience. Under these circumstances, it is necessary to clarify the application of the right of journalists not to disclose their sources of information.

12. The Assembly reaffirms that the confidentiality of journalists' sources must not be compromised by the increasing technological possibilities for public authorities to control the use by

journalists of mobile telecommunication and Internet media. The interception of correspondence, surveillance of journalists or search and seizure of information must not circumvent the protection of journalists' sources. Internet service providers and telecommunication companies should not be obliged to disclose information which may lead to the identification of journalists' sources in violation of Article 10 of the Convention.

13. Referring to the European Union's Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, the Assembly insists on the need to ensure that legal provisions enacted by member states when transposing this directive are consistent with the right of journalists not to disclose their sources under Article 10 of the Convention and with the right to privacy under Article 8 of the Convention. The Assembly also stresses the importance of ensuring coherence of domestic legislation with Articles 16 and 17 of the Convention on Cybercrime ("the Budapest Convention", ETS No. 185).

14. The Assembly welcomes the fact that journalists have expressed in professional codes of conduct their obligation not to disclose their sources of information when they receive information confidentially. This professional ethical standard ensures that sources may rely on confidentiality and decide to provide journalists with information which may be of public concern. The Assembly invites journalists and their organisations to ensure, through self-regulation, that sources are not disclosed.

15. The right of journalists not to disclose their sources of information is a professional privilege, intended to encourage sources to provide journalists with important information which they would not give without a commitment to confidentiality. The same relationship of trust does not exist with regard to non-journalists, such as individuals with their own website or web blog. Therefore, non-journalists cannot benefit from the right of journalists not to reveal their sources.
16. The Assembly welcomes the work on media freedom of the Council of Europe Commissioner for Human Rights and asks the Commissioner to pay particular attention, when visiting member states and meeting media ombudspersons, to the protection of the confidentiality of journalists' sources.

17. The Assembly recommends that the Committee of Ministers:

17.1. call on those member states which do not have legislation specifying the right of journalists not to disclose their sources of information, to pass such legislation in accordance with the case law of the European Court of Human Rights and Committee of Ministers Recommendation No. R (2000) 7;

17.2. assist member states in analysing and improving their legislation on the protection of the confidentiality of journalists' sources, in particular by supporting the review of their national laws on surveillance, anti-terrorism, data retention and access to telecommunications records;

17.3. ask its competent steering committee to draw up, in co-operation with journalists' and media freedom organisations, guidelines for prosecutors and the police, as well as training material for judges, on the right of journalists not to disclose their sources of information, in accordance with Committee of Ministers Recommendations Nos. R (2000) 7 and Rec(2003)13 and the case law of the European Court of Human Rights;

17.4. ask its competent steering committee to draw up guidelines for public authorities and private service providers concerning the protection of the confidentiality of journalists' sources in the context of the interception or disclosure of computer data and traffic data of computer networks in accordance with Articles 16 and 17 of the Convention on Cybercrime and Articles 8 and 10 of the European Convention on Human Rights.

EU-Directives and other EU-instruments

DIRECTIVE 2010/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 10 MARCH 2010 ON THE COORDINATION OF CERTAIN PROVISIONS LAID DOWN BY LAW, REGULATION OR ADMINISTRATIVE ACTION IN MEMBER STATES CONCERNING THE PROVISION OF AUDIOVISUAL MEDIA SERVICES

(Audiovisual Media Services Directive)

(codified version) - (Text with EEA relevance)

Official Journal L 095 , 15 April 2010
(...)

Whereas:

(1) Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2] has been substantially amended several times [3]. In the interests of clarity and rationality the said Directive should be codified.

(2) Audiovisual media services provided across frontiers by means of various technologies are one of the ways of pursuing the objectives of the Union. Certain measures are necessary to permit and ensure the transition from national markets to a common programme production and distribution market, and to guarantee conditions of fair competition without prejudice to the public interest role to be discharged by the audiovisual media services.

(3) The Council of Europe has adopted the European Convention on Transfrontier Television.

(4) In the light of new technologies in the transmission of audiovisual media services, a regulatory framework concerning the pursuit of broadcasting activities should take account of the impact of structural change, the spread of information and communication technologies (ICT) and technological developments on business models, especially the financing of commercial broadcasting, and should ensure optimal conditions of competitiveness and legal certainty for Europe's information technologies and its media industries and services, as well as respect for cultural and linguistic diversity.

(5) Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services.

(6) Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action under other provisions of that Treaty, in particular in order to respect and to promote the diversity of its cultures.

(7) In its resolutions of 1 December 2005 [4] and 4 April 2006 [5] on the Doha Round and on the WTO Ministerial Conferences, the European Parliament called for basic public services, such as audiovisual services, to be excluded from liberalisation under the General Agreement on Trade in Services (GATS) negotiations. In its resolution of 27 April 2006 [6], the European Parliament supported the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in particular that "cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value". Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions [7] approved the Unesco Convention on behalf of the Community. The Convention entered into force on 18 March 2007. This Directive respects the principles of that Convention.

(8) It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.

(9) This Directive is without prejudice to existing or future Union acts of harmonisation, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions and competition.

(10) Traditional audiovisual media services — such as television — and emerging on-demand audiovisual media services offer significant employment opportunities in the Union, partic-

ularly in small and medium-sized enterprises, and stimulate economic growth and investment. Bearing in mind the importance of a level playing-field and a true European market for audiovisual media services, the basic principles of the internal market, such as free competition and equal treatment, should be respected in order to ensure transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry.

(11) It is necessary, in order to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services).

(12) On 15 December 2003 the Commission adopted a Communication on the future of European regulatory audiovisual policy, in which it stressed that regulatory policy in that sector has to safeguard certain public interests, such as cultural diversity, the right to information, media pluralism, the protection of minors and consumer protection, and to enhance public awareness and media literacy, now and in the future.

(13) The resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting [8], reaffirmed that the fulfilment of the mission of public service broadcasting requires that it continue to benefit from technological progress. The co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.

(14) The Commission has adopted the initiative "i2010: European Information Society" to foster growth and jobs in the information society and media industries. This is a comprehensive strategy designed to encourage the production of European content, the development of the digital economy and the uptake of ICT, against the background of the convergence of information society services and media services, networks and devices, by modernising and deploying all EU policy instruments: regulatory instruments, research and partnerships with industry. The Commission has committed itself to creating a consistent internal market framework for information society services and media services by modernising the legal framework for audiovisual services. The goal of the i2010 initiative will in principle be achieved by allowing industries to grow with only the necessary regulation, as well as allowing small start-up businesses, which are the wealth and job creators of the future, to flourish, innovate and create employment in a free market.

(15) The European Parliament adopted on 4 September 2003 [9], 22 April 2004 [10] and 6 September 2005 [11] resolutions which in principle supported the general approach of basic rules for all audiovisual media services and additional rules for television broadcasting.

(16) This Directive enhances compliance with fundamental rights and is fully in line with the principles recognised by the Charter of Fundamental Rights of the European Union [12], in particular Article 11 thereof. In this regard, this Directive should not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.

(17) This Directive should not affect the obligations on Member States arising from the application of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services [13]. Accordingly, draft national measures applicable to on-demand audiovisual media services of a stricter or more detailed nature than those which are required to simply transpose Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [14] should be subject to the procedural obligations established pursuant to Article 8 of Directive 98/34/EC.

(18) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [15] according to its Article 1(3) is without prejudice to measures taken at Union or national level to pursue general interest objectives, in particular relating to content regulation and audiovisual policy.

(19) This Directive does not affect the responsibility of the Member States and their authorities with regard to the organisation — including the systems of licensing, administrative authorisation or taxation — the financing and the content

of programmes. The independence of cultural developments in the Member States and the preservation of cultural diversity in the Union therefore remain unaffected.

(20) No provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of audiovisual media service.

(21) For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.

(22) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.

(23) For the purposes of this Directive, the term "audiovisual" should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive, which should not affect the freedom of the Member States to regulate such services at national level in accordance with the Treaty on the Functioning of the European Union.

(24) It is characteristic of on-demand audiovisual media services that they are "television-like", i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of "programme" should be interpreted in a dynamic way taking into account developments in television broadcasting.

(25) The concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the concept of "effective control", when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [16].

(26) For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.

(27) Television broadcasting currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is an on-demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e. linear transmission.

However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.

(28) The scope of this Directive should not cover electronic versions of newspapers and magazines.

(29) All the characteristics of an audiovisual media service set out in its definition and explained in recitals 21 to 28 should be present at the same time.

(30) In the context of television broadcasting, the concept of simultaneous viewing should also cover quasi-simultaneous viewing because of the variations in the short time lag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process.

(31) A wide definition of audiovisual commercial communication should be laid down in this Directive, which should not however include public service announcements and charity appeals broadcast free of charge.

(32) For the purposes of this Directive, "European works" should be defined without prejudice to the possibility of Member States laying down a more detailed definition as regards media service providers under their jurisdiction, in compliance with Union law and account being taken of the objectives of this Directive.

(33) The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.

(34) In order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the Union, only one Member State should have jurisdiction over an audiovisual media service provider and pluralism of information should be a fundamental principle of the Union.

(35) The fixing of a series of practical criteria is designed to determine by an exhaustive procedure that only one Member State has jurisdiction over a media service provider in connection with the provision of the services which this Directive addresses. Nevertheless, taking into account the case-law of the Court of Justice of the European Union and so as to avoid cases where there is a vacuum of jurisdiction, it is appropriate to refer to the criterion of establishment within the meaning of Articles 49 to 55 of the Treaty on the Functioning of the European Union as the final criterion determining the jurisdiction of a Member State.

(36) The requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Union law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States. However, the receiving Member State may, exceptionally and under specific conditions, provisionally suspend the retransmission of televised broadcasts.

(37) Restrictions on the free provision of on-demand audiovisual media services should only be possible in accordance with conditions and procedures replicating those already established by Article 3(4), (5) and (6) of Directive 2000/31/EC.

(38) Technological developments, especially with regard to digital satellite programmes, mean that subsidiary criteria should be adapted in order to ensure suitable regulation and its effective implementation and to give players genuine power over the content of an audiovisual media service.

(39) As this Directive concerns services offered to the general public in the Union, it should apply only to audiovisual media services that can be received directly or indirectly by the public in one or more Member States with standard consumer equipment. The definition of "standard consumer equipment" should be left to the competent national authorities.

(40) Articles 49 to 55 of the Treaty on the Functioning of the European Union lay down the fundamental right to freedom of establishment. Therefore, media service providers should in general be free to choose the Member States in which they establish themselves. The Court of Justice has also emphasised that "the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established" [17].

(41) Member States should be able to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with general principles of Union law. In order to deal with situations where a broadcaster under the jurisdiction of one Member State provides a television broadcast which is wholly or mostly directed towards

the territory of another Member State, a requirement for Member States to cooperate with one another and, in cases of circumvention, the codification of the case-law of the Court of Justice [18], combined with a more efficient procedure, would be an appropriate solution that takes account of Member State concerns without calling into question the proper application of the country of origin principle. The concept of rules of general public interest has been developed by the Court of Justice in its case-law in relation to Articles 43 and 49 of the EC Treaty (now Articles 49 and 56 of the Treaty on the Functioning of the European Union) and includes, inter alia, rules on the protection of consumers, the protection of minors and cultural policy. The Member State requesting cooperation should ensure that the specific national rules in question are objectively necessary, applied in a non-discriminatory manner and proportionate.

(42) A Member State, when assessing on a case-by-case basis whether a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, may refer to indicators such as the origin of the television advertising and/or subscription revenues, the main language of the service or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received.

(43) Under this Directive, notwithstanding the application of the country of origin principle, Member States may still take measures that restrict freedom of movement of television broadcasting, but only under the conditions and following the procedure laid down in this Directive. However, the Court of Justice has consistently held that any restriction on the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively [19].

(44) In its Communication to the European Parliament and to the Council on Better Regulation for Growth and Jobs in the European Union, the Commission stressed that a careful analysis of the appropriate regulatory approach is necessary, in particular, in order to establish whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered. Furthermore, experience has shown that both co-regulation and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves. Thus self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves.

Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive. However, while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator. Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met. Without prejudice to formal obligations of the Member States regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co-regulation and/or self-regulatory regimes nor disrupt or jeopardise current co-regulation or self-regulatory initiatives which are already in place within Member States and which are working effectively.

(45) Because of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services. It is therefore important for Member States to ensure that users have easy and direct access at any time to information about the media service provider. It is for each Member State to decide the practical details as to how this objective can be achieved without prejudice to any other relevant provisions of Union law.

(46) The right of persons with a disability and of the elderly to participate and be integrated in the social and cultural life of the Union is inextricably linked to the provision of accessible audiovisual media services. The means to achieve accessibility should include, but need not be limited to, sign language, subtitling, audio-description and easily understandable menu navigation.

(47) "Media literacy" refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They are better able to protect themselves and their families from harmful or offensive material. Therefore the development of media literacy in all sections of society should be promoted and its progress followed closely. The Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry [20] already contains a series of possible measures for promoting media literacy such as, for example, continuing education of teachers and trainers, specific Internet training aimed at children from a very early age, including sessions open to parents, or organisation of national campaigns aimed at citizens, involving all communications media, to provide information on using the Internet responsibly.

(48) Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.

(49) It is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic Games, the football World Cup and the European football championship. To this end, Member States retain the right to take measures compatible with Union law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events.

(50) It is necessary to make arrangements within a Union framework, in order to avoid potential legal uncertainty and market distortions and to reconcile the free circulation of television services with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest.

(51) In particular, it is appropriate to lay down provisions concerning the exercise by broadcasters of exclusive broadcasting rights that they may have purchased to events considered to be of major importance for society in a Member State other than that having jurisdiction over the broadcasters. In order to avoid speculative rights purchases with a view to circumvention of national measures, it is necessary to apply those provisions to contracts entered into after the publication of Directive 97/36/EC of the European Parliament and of the Council [21] and concerning events which take place after the date of implementation. When contracts that predate the publication of that Directive are renewed, they are considered to be new contracts.

(52) Events of major importance for society should, for the purposes of this Directive, meet certain criteria, that is to say be outstanding events which are of interest to the general public in the Union or in a given Member State or in an important component part of a given Member State and are organised in advance by an event organiser who is legally entitled to sell the rights pertaining to those events.

(53) For the purposes of this Directive, "free television" means broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without payment in addition to the modes of funding of broadcasting that are widely prevailing in each Member State (such as licence fee and/or the basic tier subscription fee to a cable network).

(54) Member States are free to take whatever measures they deem appropriate with regard to audiovisual media services which come from third countries and which do not satisfy the conditions laid down in Article 2, provided they comply with Union law and the international obligations of the Union.

(55) In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the Union are fully and properly protected, those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in a timely manner before the event of high interest to the public takes place to give others sufficient time to exercise such a right. A broadcaster should be able to exercise this right through an intermediary acting specifically on its behalf on a case-by-case basis. Such short extracts may be used for EU-wide broadcasts by any channel including dedicated sports channels and should not exceed 90

seconds. The right of access to short extracts should apply on a trans-frontier basis only where it is necessary. Therefore a broadcaster should first seek access from a broadcaster established in the same Member State having exclusive rights to the event of high interest to the public.

The concept of general news programmes should not cover the compilation of short extracts into programmes serving entertainment purposes. The country of origin principle should apply to both the access to, and the transmission of, the short extracts. In a trans-frontier case, this means that the different laws should be applied sequentially. Firstly, for access to the short extracts the law of the Member State where the broadcaster supplying the initial signal (i.e. giving access) is established should apply. This is usually the Member State in which the event concerned takes place. Where a Member State has established an equivalent system of access to the event concerned, the law of that Member State should apply in any case. Secondly, for transmission of the short extracts, the law of the Member State where the broadcaster transmitting the short extracts is established should apply.

(56) The requirements of this Directive regarding access to events of high interest to the public for the purpose of short news reports should be without prejudice to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [22] and the relevant international conventions in the field of copyright and neighbouring rights. Member States should facilitate access to events of high interest to the public by granting access to the broadcaster's signal within the meaning of this Directive. However, they may choose other equivalent means within the meaning of this Directive. Such means include, inter alia, granting access to the venue of these events prior to granting access to the signal. Broadcasters should not be prevented from concluding more detailed contracts.

(57) It should be ensured that the practice of media service providers of providing their live television broadcast news programmes in the on-demand mode after live transmission is possible without having to tailor the individual programme by omitting the short extracts. This possibility should be restricted to the on-demand supply of the identical television broadcast programme by the same media service provider, so it may not be used to create new on-demand business models based on short extracts.

(58) On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society [23]. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive.

(59) The availability of harmful content in audiovisual media services is a concern for legislators, the media industry and parents. There will also be new challenges, especially in connection with new platforms and new products. Rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications, are therefore necessary.

(60) Measures taken to protect the physical, mental and moral development of minors and human dignity should be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union. The aim of those measures, such as the use of personal identification numbers (PIN codes), filtering systems or labelling, should thus be to ensure an adequate level of protection of the physical, mental and moral development of minors and human dignity, especially with regard to on-demand audiovisual media services. The Recommendation on the protection of minors and human dignity and on the right of reply already recognised the importance of filtering systems and labelling and included a number of possible measures for the benefit of minors, such as systematically supplying users with an effective, updatable and easy-to-use filtering system when they subscribe to an access provider or equipping the access to services specifically intended for children with automatic filtering systems.

(61) Media service providers under the jurisdiction of the Member States should in any case be subject to a ban on the dissemination of child pornography in accordance with the provisions of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography [24].

(62) None of the provisions of this Directive that concern the protection of the physical, mental and moral development of minors and human dignity necessarily requires that the measures taken to protect those interests should be implemented through the prior verification of audiovisual media services by public bodies.

(63) Coordination is needed to make it easier for persons and industries producing programmes having a cultural objective to take up and pursue their activities.

(64) Minimum requirements in respect of all public or private Union television broadcasts for European audiovisual productions have been a means of promoting production, independent production and distribution in the abovementioned industries and are complementary to other instruments which are already or will be proposed to favour the same objective.

(65) It is therefore necessary to promote markets of sufficient size for television productions in the Member States to recover necessary investments not only by establishing common rules opening up national markets but also by envisaging for European productions, where practicable and by appropriate means, a majority proportion in television broadcasts of all Member States. In order to allow the monitoring of the application of those rules and the pursuit of the objectives, Member States should provide the Commission with a report on the application of the proportions reserved for European works and independent productions in this Directive. For the calculation of such proportions, account should be taken of the specific situation of Greece and Portugal. The Commission should inform the other Member States of these reports accompanied, where appropriate, by an opinion taking account of, in particular, progress achieved in relation to previous years, the share of first broadcasts in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audiovisual production capacity or restricted language area.

(66) It is important to seek appropriate instruments and procedures in accordance with Union law in order to promote the implementation of the objectives of this Directive with a view to adopting suitable measures to encourage the activity and development of European audiovisual production and distribution, particularly in countries with a low production capacity or a restricted language area.

(67) The proportions of European works must be achieved taking economic realities into account. Therefore, a progressive system for achieving this objective is required.

(68) A commitment, where practicable, to a certain proportion of broadcasts for independent productions, created by producers who are independent of broadcasters, will stimulate new sources of television production, especially the creation of small and medium-sized enterprises. It will offer new opportunities and marketing outlets to creative talents, to cultural professions and to employees in the cultural field.

(69) On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. It is important to re-examine regularly the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports provided for under this Directive, Member States should also take into account, in particular, the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services, and the actual consumption of European works offered by such services.

(70) When implementing Article 16, Member States should encourage broadcasters to include an adequate share of co-produced European works or of European works of non-domestic origin.

(71) When defining "producers who are independent of broadcasters" as referred to in Article 17, Member States should take appropriate account notably of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights.

(72) Channels broadcasting entirely in a language other than those of the Member States should not be covered by Articles 16 and 17 of this Directive. Nevertheless, where such a language or languages represent a substantial part but not all of the channel's transmission time, Articles 16 and 17 should not apply to that part of transmission time.

(73) National support schemes for the development of European production may be applied in so far as they comply with Union law.

(74) The objective of supporting audiovisual production in Europe can be pursued within the Member States in the framework of the organisation of their audiovisual media services, inter

alia, through the definition of a public interest mission for certain media service providers, including the obligation to contribute substantially to investment in European production.

(75) Media service providers, programme makers, producers, authors and other experts should be encouraged to develop more detailed concepts and strategies aimed at developing European audiovisual fiction films that are addressed to an international audience.

(76) It is important to ensure that cinematographic works are transmitted within periods agreed between right holders and media service providers.

(77) The question of specific time scales for each type of showing of cinematographic works is primarily a matter to be settled by means of agreements between the interested parties or professionals concerned.

(78) In order to allow for an active policy in favour of a specific language, Member States remain free to lay down more detailed or stricter rules in particular on the basis of language criteria, as long as those rules are in conformity with Union law, and in particular are not applicable to the retransmission of broadcasts originating in other Member States.

(79) The availability of on-demand audiovisual media services increases consumer choice. Detailed rules governing audiovisual commercial communication for on-demand audiovisual media services thus appear neither to be justified nor to make sense from a technical point of view. Nevertheless, all audiovisual commercial communication should respect not only the identification rules but also a basic tier of qualitative rules in order to meet clear public policy objectives.

(80) As has been recognised by the Commission in its interpretative communication on certain aspects of the provisions on televised advertising in the "Television without frontiers" Directive [25], the development of new advertising techniques and marketing innovations has created new effective opportunities for audiovisual commercial communications in traditional broadcasting services, potentially enabling them to compete better on a level playing-field with on-demand innovations.

(81) Commercial and technological developments give users increased choice and responsibility in their use of audiovisual media services. In order to remain proportionate with the goals of general interest, regulation should allow a certain degree of flexibility with regard to television broadcasting. The principle of separation should be limited to television advertising and teleshopping, and product placement should be allowed under certain circumstances, unless a Member State decides otherwise. However, where product placement is surreptitious, it should be prohibited. The principle of separation should not prevent the use of new advertising techniques.

(82) Apart from the practices that are covered by this Directive, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [26] applies to unfair commercial practices, such as misleading and aggressive practices occurring in audiovisual media services. In addition, Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [27], which prohibits advertising and sponsorship for cigarettes and other tobacco products in printed media, information society services and radio broadcasting, should be without prejudice to this Directive, in view of the special characteristics of audiovisual media services. Article 88(1) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [28], which prohibits advertising to the general public of certain medicinal products, applies, as provided in paragraph 5 of that Article and without prejudice to Article 21 of this Directive. Furthermore, this Directive should be without prejudice to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods [29].

(83) In order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.

(84) Member States, with due regard to Union law and in relation to broadcasts intended solely for the national territory which may not be received, directly or indirectly, in one or more Member States, should be able to lay down different conditions for the insertion of advertising and different limits for the volume of advertising in order to facilitate these particular broadcasts.

(85) Given the increased possibilities for viewers to avoid advertising through the use of new technologies such as digital personal video recorders and increased choice of channels, detailed regulation with regard to the insertion of spot advertising with the aim of protecting viewers is not justified. While the hourly amount of admissible advertising should not be increased, this Directive should give flexibility to broadcasters with regard to its insertion where this does not unduly impair the integrity of programmes.

(86) This Directive is intended to safeguard the specific character of European television, where advertising is preferably inserted between programmes, and therefore limits possible interruptions to cinematographic works and films made for television as well as interruptions to some categories of programmes that need specific protection.

(87) A limit of 20 % of television advertising spots and teleshopping spots per clock hour, also applying during "prime time", should be laid down. The concept of a television advertising spot should be understood as television advertising in the sense of point (i) of Article 1(1) having a duration of not more than 12 minutes.

(88) It is necessary to prohibit all audiovisual commercial communication promoting cigarettes and other tobacco products including indirect forms of audiovisual commercial communication which, whilst not directly mentioning the tobacco product, seek to circumvent the ban on audiovisual commercial communication for cigarettes and other tobacco products by using brand names, symbols or other distinctive features of tobacco products or of undertakings whose known or main activities include the production or sale of such products.

(89) It is also necessary to prohibit all audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls and to lay down strict criteria relating to the television advertising of alcoholic products.

(90) Surreptitious audiovisual commercial communication is a practice prohibited by this Directive because of its negative effect on consumers. The prohibition of surreptitious audiovisual commercial communication should not cover legitimate product placement within the framework of this Directive, where the viewer is adequately informed of the existence of product placement. This can be done by signalling the fact that product placement is taking place in a given programme, for example by means of a neutral logo.

(91) Product placement is a reality in cinematographic works and in audiovisual works made for television. In order to ensure a level playing-field, and thus enhance the competitiveness of the European media industry, rules for product placement are necessary. The definition of product placement laid down in this Directive should cover any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration. The provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value. Product placement should be subject to the same qualitative rules and restrictions applying to audiovisual commercial communication. The decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product is built into the action of a programme, which is why the definition in point (m) of Article 1(1) contains the word "within". In contrast, sponsor references may be shown during a programme but are not part of the plot.

(92) Product placement should, in principle, be prohibited. However, derogations are appropriate for some kinds of programme, on the basis of a positive list. A Member State should be able to opt out of these derogations, totally or partially, for example by permitting product placement only in programmes which have not been produced exclusively in that Member State.

(93) Furthermore, sponsorship and product placement should be prohibited where they influence the content of programmes in such a way as to affect the responsibility and the editorial independence of the media service provider. This is the case with regard to thematic placement.

(94) In accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments

chosen by Member States should contribute to the promotion of media pluralism.

(95) Close cooperation between competent regulatory bodies of the Member States and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States and between their regulatory bodies is particularly important with regard to the impact which broadcasters established in one Member State might have on another Member State. Where licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective bodies take place before such licences are granted. This cooperation should cover all fields coordinated by this Directive.

(96) It is necessary to make clear that self-promotional activities are a particular form of advertising in which the broadcaster promotes its own products, services, programmes or channels. In particular, trailers consisting of extracts from programmes should be treated as programmes.

(97) Daily transmission time allotted to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from these, or to public service announcements and charity appeals broadcast free of charge, should not be included in the maximum amounts of daily or hourly transmission time that may be allotted to advertising and teleshopping.

(98) In order to avoid distortions of competition, this derogation should be limited to announcements concerning products that fulfil the dual condition of being both ancillary to and directly derived from the programmes concerned. The term "ancillary" refers to products intended specifically to allow the viewing public to benefit fully from, or to interact with, these programmes.

(99) In view of the development of teleshopping, an economically important activity for operators as a whole and a genuine outlet for goods and services within the Union, it is essential to ensure a high level of consumer protection by putting in place appropriate standards regulating the form and content of such broadcasts.

(100) It is important for the competent national authorities, in monitoring the implementation of the relevant provisions, to be able to distinguish, as regards channels not exclusively devoted to teleshopping, between transmission time devoted to teleshopping spots, advertising spots and other forms of advertising on the one hand and, on the other, transmission time devoted to teleshopping windows. It is therefore necessary and sufficient that each window be clearly identified by optical and acoustic means at least at the beginning and the end of the window.

(101) This Directive should apply to channels exclusively devoted to teleshopping or self-promotion, without conventional programme elements such as news, sports, films, documentaries and drama, solely for the purposes of this Directive and without prejudice to the inclusion of such channels in the scope of other Union instruments.

(102) Although television broadcasters are normally bound to ensure that programmes present facts and events fairly, it is nevertheless important that they should be subject to specific obligations with respect to the right of reply or equivalent remedies so that any person whose legitimate interests have been damaged by an assertion made in the course of a broadcast television programme may effectively exercise such right or remedy.

(103) The right of reply is an appropriate legal remedy for television broadcasting and could also be applied in the on-line environment. The Recommendation on the protection of minors and human dignity and on the right of reply already includes appropriate guidelines for the implementation of measures in national law or practice so as to ensure sufficiently the right of reply or equivalent remedies in relation to on-line media.

(104) Since the objectives of this Directive, namely the creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(105) This Directive is without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
DEFINITIONS

Article 1

1. For the purposes of this Directive, the following definitions shall apply:

(a) "audiovisual media service" means:

(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication;

(b) "programme" means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

(c) "editorial responsibility" means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

(d) "media service provider" means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

(e) "television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

(f) "broadcaster" means a media service provider of television broadcasts;

(g) "on-demand audiovisual media service" (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

(h) "audiovisual commercial communication" means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement;

(i) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;

(j) "surreptitious audiovisual commercial communication" means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration;

(k) "sponsorship" means any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting their name, trade mark, image, activities or products;

(l) "teleshopping" means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment;

(m) "product placement" means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is

featured within a programme, in return for payment or for similar consideration;
(n) "European works" means the following:
(i) works originating in Member States;
(ii) works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 3;
(iii) works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.
2. The application of the provisions of points (n)(ii) and (iii) of paragraph 1 shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned.
3. The works referred to in points (n)(i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the States referred to in those provisions provided that they comply with one of the following three conditions:
(i) they are made by one or more producers established in one or more of those States;
(ii) the production of the works is supervised and actually controlled by one or more producers established in one or more of those States;
(iii) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.
4. Works that are not European works within the meaning of point (n) of paragraph 1 but that are produced within the framework of bilateral co-production agreements concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Union supply a majority share of the total cost of production and that the production is not controlled by one or more producers established outside the territory of the Member States.

CHAPTER II
GENERAL PROVISIONS

Article 2

1. Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.
2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are any of the following:
(a) those established in that Member State in accordance with paragraph 3;
(b) those to whom paragraph 4 applies.
3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:
(a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;
(b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;
(c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State.
4. Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:
(a) they use a satellite up-link situated in that Member State;
(b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.
5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the media service provider is established within the meaning of

Articles 49 to 55 of the Treaty on the Functioning of the European Union.
6. This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.

Article 3

1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.
2. In respect of television broadcasting, Member States may provisionally derogate from paragraph 1 if the following conditions are fulfilled:
(a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 27(1) or (2) and/or Article 6;
(b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in point (a) on at least two prior occasions;
(c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again;
(d) consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in point (c), and the alleged infringement persists.
The Commission shall, within 2 months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Union law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.
3. Paragraph 2 shall be without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned.
4. In respect of on-demand audiovisual media services, Member States may take measures to derogate from paragraph 1 in respect of a given service if the following conditions are fulfilled:
(a) the measures are:
(i) necessary for one of the following reasons:
- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
- the protection of public health,
- public security, including the safeguarding of national security and defence,
- the protection of consumers, including investors;
(ii) taken against an on-demand audiovisual media service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;
(iii) proportionate to those objectives;
(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:
(i) asked the Member State under whose jurisdiction the media service provider falls to take measures and the latter did not take such measures, or they were inadequate;
(ii) notified the Commission and the Member State under whose jurisdiction the media service provider falls of its intention to take such measures.
5. Member States may, in urgent cases, derogate from the conditions laid down in point (b) of paragraph 4. Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State under whose jurisdiction the media service provider falls, indicating the reasons for which the Member State considers that there is urgency.
6. Without prejudice to the Member State's possibility of proceeding with the measures referred to in paragraphs 4 and 5, the Commission shall examine the compatibility of the notified measures with Union law in the shortest possible time. Where it comes to the conclusion that the measures are incompatible with Union law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

Article 4

1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.

2. In cases where a Member State:

(a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and

(b) assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory;

it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules of general public interest in question. The Member State having jurisdiction shall inform the first Member State of the results obtained following this request within 2 months. Either Member State may invite the contact committee established pursuant to Article 29 to examine the case.

3. The first Member State may adopt appropriate measures against the broadcaster concerned where it assesses that:

(a) the results achieved through the application of paragraph 2 are not satisfactory; and

(b) the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established in the first Member State.

Such measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.

4. A Member State may take measures pursuant to paragraph 3 only if the following conditions are met:

(a) it has notified the Commission and the Member State in which the broadcaster is established of its intention to take such measures while substantiating the grounds on which it bases its assessment; and

(b) the Commission has decided that the measures are compatible with Union law, and in particular that assessments made by the Member State taking those measures under paragraphs 2 and 3 are correctly founded.

5. The Commission shall decide within 3 months following the notification provided for in point (a) of paragraph 4. If the Commission decides that the measures are incompatible with Union law, the Member State in question shall refrain from taking the proposed measures.

6. Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive.

7. Member States shall encourage co-regulation and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.

8. Directive 2000/31/EC shall apply unless otherwise provided for in this Directive. In the event of a conflict between a provision of Directive 2000/31/EC and a provision of this Directive, the provisions of this Directive shall prevail, unless otherwise provided for in this Directive.

CHAPTER III
PROVISIONS APPLICABLE TO ALL AUDIOVISUAL MEDIA SERVICES

Article 5

Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:

(a) the name of the media service provider;

(b) the geographical address at which the media service provider is established;

(c) the details of the media service provider, including its electronic mail address or website, which allow it to be contacted rapidly in a direct and effective manner;

(d) where applicable, the competent regulatory or supervisory bodies.

Article 6

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

Article 7

Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.

Article 8

Member States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders.

Article 9

1. Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:
(a) audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication shall be prohibited;
(b) audiovisual commercial communications shall not use subliminal techniques;
(c) audiovisual commercial communications shall not:
(i) prejudice respect for human dignity;
(ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
(iii) encourage behaviour prejudicial to health or safety;
(iv) encourage behaviour grossly prejudicial to the protection of the environment;
(d) all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited;
(e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;
(f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;
(g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.
2. Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

Article 10

1. Audiovisual media services or programmes that are sponsored shall meet the following requirements:
(a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
(b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
(c) viewers shall be clearly informed of the existence of a sponsorship agreement. Sponsored programmes shall be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or at the end of the programmes.
2. Audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.
3. The sponsorship of audiovisual media services or programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking, but shall not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.
4. News and current affairs programmes shall not be sponsored. Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.

Article 11

1. Paragraphs 2, 3 and 4 shall apply only to programmes produced after 19 December 2009.
2. Product placement shall be prohibited.
3. By way of derogation from paragraph 2, product placement shall be admissible in the following cases unless a Member State decides otherwise:

(a) in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes;
(b) where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme.
The derogation provided for in point (a) shall not apply to children's programmes.
Programmes that contain product placement shall meet at least all of the following requirements:
(a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
(b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
(c) they shall not give undue prominence to the product in question;
(d) viewers shall be clearly informed of the existence of product placement. Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.
By way of exception, Member States may choose to waive the requirements set out in point (d) provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.
4. In any event programmes shall not contain product placement of:
(a) tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products;
(b) specific medicinal products or medical treatments available only on prescription in the Member State under whose jurisdiction the media service provider falls.

CHAPTER IV
PROVISIONS APPLICABLE ONLY TO ON-DEMAND AUDIOVISUAL MEDIA SERVICES

Article 12

Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services.

Article 13

1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.
2. Member States shall report to the Commission no later than 19 December 2011 and every 4 years thereafter on the implementation of paragraph 1.
3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.

CHAPTER V
PROVISIONS CONCERNING EXCLUSIVE RIGHTS AND SHORT NEWS REPORTS IN TELEVISION BROADCASTING

Article 14

1. Each Member State may take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due time. In so doing the Member State con-

cerned shall also determine whether these events should be available by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of 3 months from the notification, the Commission shall verify that such measures are compatible with Union law and communicate them to the other Member States. It shall seek the opinion of the contact committee established pursuant to Article 29. It shall forthwith publish the measures taken in the Official Journal of the European Union and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means within the framework of their legislation, that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters after 18 December 2007 in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with paragraphs 1 and 2 by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.

Article 15

1. Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.

2. If another broadcaster established in the same Member State as the broadcaster seeking access has acquired exclusive rights to the event of high interest to the public, access shall be sought from that broadcaster.

3. Member States shall ensure that such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal with, unless impossible for reasons of practicality, at least the identification of their source.

4. As an alternative to paragraph 3, Member States may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.

5. Short extracts shall be used solely for general news programmes and may be used in on-demand audiovisual media services only if the same programme is offered on a deferred basis by the same media service provider.

6. Without prejudice to paragraphs 1 to 5, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the provision of such short extracts are defined, in particular, with respect to any compensation arrangements, the maximum length of short extracts and time limits regarding their transmission. Where compensation is provided for, it shall not exceed the additional costs directly incurred in providing access.

CHAPTER VI
PROMOTION OF DISTRIBUTION AND PRODUCTION OF TELEVISION PROGRAMMES

Article 16

1. Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

2. Where the proportion laid down in paragraph 1 cannot be attained, it must not be lower than the average for 1988 in the Member State concerned.

However, in respect of Greece and Portugal, the year 1988 shall be replaced by the year 1990.

3. Member States shall provide the Commission every 2 years, starting from 3 October 1991, with a report on the application of this Article and Article 17.

That report shall in particular include a statistical statement on the achievement of the proportion referred to in this Article and Article 17 for each of the television programmes falling within the jurisdiction of the Member State concerned, the reasons, in each case, for the failure to attain that proportion and the measures adopted or envisaged in order to achieve it.

The Commission shall inform the other Member States and the European Parliament of the reports, which shall be accompanied, where appropriate, by an opinion. The Commission shall ensure the application of this Article and Article 17 in accordance with the provisions of the Treaty on the Functioning of the European Union. The Commission may take account in its opinion, in particular, of progress achieved in relation to previous years, the share of first broadcast works in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audiovisual production capacity or restricted language area.

Article 17

Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria. It must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within 5 years of their production.

Article 18

This Chapter shall not apply to television broadcasts that are intended for local audiences and do not form part of a national network.

CHAPTER VII
TELEVISION ADVERTISING AND TELESHOPPING

Article 19

1. Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.

2. Isolated advertising and teleshopping spots, other than in transmissions of sports events, shall remain the exception.

Article 20

1. Member States shall ensure, where television advertising or teleshopping is inserted during programmes, that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme concerned, and the rights of the right holders are not prejudiced.

2. The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping shall be inserted during religious services.

Article 21

Teleshopping for medicinal products which are subject to a marketing authorisation within the meaning of Directive 2001/83/EC, as well as teleshopping for medical treatment, shall be prohibited.

Article 22

Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria:

(a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;

(b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;

(c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;

(d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;

(e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;

(f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.

Article 23

1. The proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20 %.

2. Paragraph 1 shall not apply to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, sponsorship announcements and product placements.

Article 24

Teleshopping windows shall be clearly identified as such by optical and acoustic means and shall be of a minimum uninterrupted duration of 15 minutes.

Article 25

This Directive shall apply mutatis mutandis to television channels exclusively devoted to advertising and teleshopping as well as to television channels exclusively devoted to self-promotion. However, Chapter VI as well as Articles 20 and 23 shall not apply to these channels.

Article 26

Without prejudice to Article 4, Member States may, with due regard for Union law, lay down conditions other than those laid down in Article 20(2) and Article 23 in respect of television broadcasts intended solely for the national territory which cannot be received directly or indirectly by the public in one or more other Member States.

CHAPTER VIII
PROTECTION OF MINORS IN TELEVISION BROADCASTING

Article 27

1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.
2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.
3. In addition, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.

CHAPTER IX
RIGHT OF REPLY IN TELEVISION BROADCASTING

Article 28

1. Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.
2. A right of reply or equivalent remedies shall exist in relation to all broadcasters under the jurisdiction of a Member State.
3. Member States shall adopt the measures needed to establish the right of reply or the equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons resident or established in other Member States.
4. An application for exercise of the right of reply or the equivalent remedies may be rejected if such a reply is not justified according to the conditions laid down in paragraph 1, would involve a punishable act, would render the broadcaster liable to civil-law proceedings or would transgress standards of public decency.
5. Provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

CHAPTER X
CONTACT COMMITTEE

Article 29

1. A contact committee is established under the aegis of the Commission. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and meet either on

his initiative or at the request of the delegation of a Member State.

2. The tasks of the contact committee shall be:

(a) to facilitate effective implementation of this Directive through regular consultation on any practical problems arising from its application, and particularly from the application of Article 2, as well as on any other matters on which exchanges of views are deemed useful;

(b) to deliver own-initiative opinions or opinions requested by the Commission on the application by the Member States of this Directive;

(c) to be the forum for an exchange of views on what matters should be dealt with in the reports which Member States must submit pursuant to Article 16(3) and on their methodology;

(d) to discuss the outcome of regular consultations which the Commission holds with representatives of broadcasting organisations, producers, consumers, manufacturers, service providers and trade unions and the creative community;

(e) to facilitate the exchange of information between the Member States and the Commission on the situation and the development of regulatory activities regarding audiovisual media services, taking account of the Union's audiovisual policy, as well as relevant developments in the technical field;

(f) to examine any development arising in the sector on which an exchange of views appears useful.

CHAPTER XI
COOPERATION BETWEEN REGULATORY BODIES OF THE MEMBER STATES

Article 30

Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies.

CHAPTER XII
FINAL PROVISIONS

Article 31

In fields which this Directive does not coordinate, it shall not affect the rights and obligations of Member States resulting from existing conventions dealing with telecommunications or broadcasting.

Article 32

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 33

Not later than 19 December 2011, and every 3 years thereafter, the Commission shall submit to the European Parliament, to the Council and to the European Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of audiovisual media services, in particular in the light of recent technological developments, the competitiveness of the sector and levels of media literacy in all Member States.

That report shall also assess the issue of television advertising accompanying or included in children's programmes, and in particular whether the quantitative and qualitative rules contained in this Directive have afforded the level of protection required.

Article 34

Directive 89/552/EEC, as amended by the Directives listed in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 35

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 36

This Directive is addressed to the Member States.

Done at Strasbourg, 10 March 2010.

(...)

[1] Position of the European Parliament of 20 October 2009 (not yet published in the Official Journal) and Council Decision of 15 February 2010.

[2] OJ L 298, 17.10.1989, p. 23. The original title of the act was "Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or ad-

ministrative action in Member States concerning the pursuit of television broadcasting activities".
[3] See Annex I, Part A.
[4] OJ C 285 E, 22.11.2006, p. 126.
[5] OJ C 293 E, 2.12.2006, p. 155.
[6] OJ C 296 E, 6.12.2006, p. 104.
[7] OJ L 201, 25.7.2006, p. 15.
[8] OJ C 30, 5.2.1999, p. 1.
[9] European Parliament resolution on Television without Frontiers (OJ C 76 E, 25.3.2004, p. 453).
[10] European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (OJ C 104 E, 30.4.2004, p. 1026).
[11] European Parliament resolution on the application of Articles 4 and 5 of Directive 89/552/EEC (Television without Frontiers), as amended by Directive 97/36/EC, for the period 2001-2002 (OJ C 193 E, 17.8.2006, p. 117).
[12] OJ C 364, 18.12.2000, p. 1.
[13] OJ L 204, 21.7.1998, p. 37.
[14] OJ L 332, 18.12.2007, p. 27.
[15] OJ L 108, 24.4.2002, p. 33.
[16] OJ L 178, 17.7.2000, p. 1.
[17] Case C-56/96 VT4 Ltd v Vlaamse Gemeenschap [1997] ECR I-3143, paragraph 22; Case C-212/97 Centros v Erhvervs-og Selskabsstyrelsen [1999] ECR I-1459; see also: Case C-11/95 Commission v Belgium [1996] ECR I-4115; and Case C-14/96 Paul Denuit [1997] ECR I-2785.
[18] Case C-212/97 Centros v Erhvervs-og Selskabsstyrelsen, cited above; Case 33/74 Van Binsbergen v Bestuur van de Bedrijfsvereniging [1974] ECR 1299; Case C-23/93 TV 10 SA v Commissariaat voor de Media [1994] ECR I-4795, paragraph 21.
[19] Case C-355/98 Commission v Belgium [2000] ECR I-1221, paragraph 28; Case C-348/96 Calfa [1999] ECR I-11, paragraph 23.
[20] OJ L 378, 27.12.2006, p. 72.
[21] OJ L 202, 30.7.1997, p. 60.
[22] OJ L 167, 22.6.2001, p. 10.
[23] Case C-89/04 Mediakabel BV v Commissariaat voor de Media [2005] ECR I-4891.
[24] OJ L 13, 20.1.2004, p. 44.
[25] OJ C 102, 28.4.2004, p. 2.
[26] OJ L 149, 11.6.2005, p. 22.
[27] OJ L 152, 20.6.2003, p. 16.
[28] OJ L 311, 28.11.2001, p. 67.
[29] OJ L 404, 30.12.2006, p. 9.

ANNEX I
PART A
Repealed Directive with list of its successive amendments (referred to in Article 34)
Council Directive 89/552/EEC (OJ L 298, 17.10.1989, p. 23) | |
Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60) | |
Directive 2007/65/EC of the European Parliament and of the Council (OJ L 332, 18.12.2007, p. 27) | *only Article 1* |
PART B
List of time limits for transposition into national law (referred to in Article 34)
Directive | *Time limit for transposition* |
89/552/EEC | *3 October 1991* |
97/36/EC | *31 December 1998* |
2007/65/EC | *19 December 2009* |

ANNEX II
CORRELATION TABLE
Directive 89/552/EEC | *This Directive* |
Article 1, introductory wording | *Article 1(1), introductory wording* |
Article 1(a), introductory wording | *Article 1(1)(a), introductory wording* |
Article 1(a), first indent | *Article 1(1)(a)(i)* |
Article 1(a), second indent | *Article 1(1)(a)(ii)* |
Article 1(b) to (m) | *Article 1(1)(b) to (m)* |
Article 1(n)(i), introductory wording | *Article 1(1)(n), introductory wording* |
Article 1(n)(i), first indent | *Article 1(1)(n)(i)* |
Article 1(n)(i), second indent | *Article 1(1)(n)(ii)* |
Article 1(n)(i), third indent | *Article 1(1)(n)(iii)* |
Article 1(n)(i), fourth indent | *Article 1(2)* |
Article 1(n)(ii), introductory wording | *Article 1(3), introductory wording* |
Article 1(n)(ii), first indent | *Article 1(3)(i)* |
Article 1(n)(ii), second indent | *Article 1(3)(ii)* |
Article 1(n)(ii), third indent | *Article 1(3)(iii)* |
Article 1(n)(iii) | *Article 1(4)* |
Article 2 | *Article 2* |
Article 2a(1), (2) and (3) | *Article 3(1), (2) and (3)* |
Article 2a(4), introductory wording | *Article 3(4), introductory wording* |
Article 2a(4)(a) | *Article 3(4)(a)* |
Article 2a(4)(b), introductory wording | *Article 3(4)(b), introductory wording* |
Article 2a(4)(b), first indent | *Article 3(4)(b)(i)* |
Article 2a(4)(b), second indent | *Article 3(4)(b)(ii)* |
Article 2a(5) and (6) | *Article 3(5) and (6)* |
Article 3 | *Article 4* |
Article 3a | *Article 5* |
Article 3b | *Article 6* |
Article 3c | *Article 7* |
Article 3d | *Article 8* |
Article 3e | *Article 9* |
Article 3f | *Article 10* |
Article 3g(1) | *Article 11(2)* |
Article 3g(2), first subparagraph, introductory wording | *Article 11(3), first subparagraph, introductory wording* |
Article 3g(2), first subparagraph, first indent | *Article 11(3), first subparagraph, point (a)* |
Article 3g(2), first subparagraph, second indent | *Article 11(3), first subparagraph, point (b)* |
Article 3g(2), second, third and fourth subparagraphs | *Article 11(3), second, third and fourth subparagraphs* |
Article 3g(3) | *Article 11(4)* |
Article 3g(4) | *Article 11(1)* |
Article 3h | *Article 12* |
Article 3i | *Article 13* |
Article 3j | *Article 14* |
Article 3k | *Article 15* |
Article 4(1), (2) and (3) | *Article 16(1), (2) and (3)* |
Article 4(4) | — |
Article 5 | *Article 17* |
Article 9 | *Article 18* |
Article 10 | *Article 19* |
Article 11 | *Article 20* |
Article 14 | *Article 21* |
Article 15 | *Article 22* |
Article 18 | *Article 23* |
Article 18a | *Article 24* |
Article 19 | *Article 25* |
Article 20 | *Article 26* |
Article 22 | *Article 27* |
Article 23 | *Article 28* |
Article 23a | *Article 29* |

Article 23b | *Article 30* |
Article 24 | *Article 31* |
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Article 26 | *Article 33* |
— | *Article 34* |
— | *Article 35* |
Article 27 | *Article 36* |
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DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 8 JUNE 2000 ON CERTAIN LEGAL ASPECTS OF INFORMATION SOCIETY SERVICES, IN PARTICULAR ELECTRONIC COMMERCE, IN THE INTERNAL MARKET

(Directive on electronic commerce)

Official Journal L 178, 17July 2000

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission(1),
(1) OJ C 30, 5.2.1999, p. 4

Having regard to the opinion of the Economic and Social Committee(2),
(2) OJ C 169, 16.6.1999, p. 36.

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),
(3) Opinion of the European Parliament of 6 May 1999 (OJ C 279, 1.10.1999, p. 389), Council common position of 28 February 2000 (OJ C 128, 8.5.2000, p. 32) and Decision of the European Parliament of 4 May 2000 (not yet published in the Official Journal).

Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movements of goods, services and the freedom of establishment are ensured; the development of information society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.
(2) The development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet.
(3) Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.
(4) It is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities(4), a high level of Community integration is achieved.
(4) OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).
(5) The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.
(6) In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles should be elimi-

nated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

(7) In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.

(8) The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such.

(9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

(10) In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.

(11) This Directive is without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts(5) and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts(6) form a vital element for protecting consumers in contractual matters; those Directives also apply in their entirety to information society services; that same Community acquis, which is fully applicable to information society services, also embraces in particular Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising(7), Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit(8), Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field(9), Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours(10), Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer production in the indication of prices of products offered to consumers(11), Council Directive 92/59/EEC of 29 June 1992 on general product safety(12), Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis(13), Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests(14), Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions concerning liability for defective products(15), Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees(16), the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products(17); this Directive should be without prejudice to Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products(18) adopted within the framework of the internal market, or to directives on the protection of public health; this Directive complements information requirements established by

the abovementioned Directives and in particular Directive 97/7/EC.

(5) OJ L 95, 21.4.1993, p. 29.
(6) OJ L 144, 4.6.1999, p. 19.
(7) OJ L 250, 19.9.1984, p. 17. Directive as amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p. 18).
(8) OJ L 42, 12.2.1987, p. 48. Directive as last amended by Directive 98/7/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p. 17).
(9) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).
(10) OJ L 158, 23.6.1990, p. 59.
(11) OJ L 80, 18.3.1998, p. 27.
(12) OJ L 228, 11.8.1992, p. 24.
(13) OJ L 280, 29.10.1994, p. 83.
(14) OJ L 166, 11.6.1998, p. 51. Directive as amended by Directive 1999/44/EC (OJ L 171, 7.7.1999, p. 12).
(15) OJ L 210, 7.8.1985, p. 29. Directive as amended by Directive 1999/34/EC (OJ L 141, 4.6.1999, p. 20).
(16) OJ L 171, 7.7.1999, p. 12.
(17) OJ L 113, 30.4.1992, p. 13.
(18) OJ L 213, 30.7.1998, p. 9.

(12) It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded form the scope of this Directive.

(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.

(14) The protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data(19) and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector(20) which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet.

(19) OJ L 281, 23.11.1995, p. 31.
(20) OJ L 24, 30.1.1998, p. 1.

(15) The confidentiality of communications is guaranteed by Article 5 Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.

(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.

(17) The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services(21) and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access(22); this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition.

(21) OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).
(22) OJ L 320, 28.11.1998, p. 54.

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they

represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.

(20) The definition of "recipient of a service" covers all types of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons.

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member States' legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art.

(22) Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.

(24) In the context of this Directive, notwithstanding the rule on the control at source of information society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of information society services.

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide infor-

mation society services in conformity with conditions established in this Directive.
(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission.
(27) This Directive, together with the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creating of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances of restricting the freedom to provide information society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors.
(28) The Member States' obligation not to subject access to the activity of an information society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service(23) consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification service.
(23) OJ L 15, 21.1.1998, p. 14.

(29) Commercial communications are essential for the financing of information society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC.
(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks; the question of consent by recipient of certain forms of unsolicited commercial communications is not addressed by this Directive, but has already been addressed, in particular, by Directive 97/7/EC and by Directive 97/66/EC; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; in addition it is necessary that in any event unsolicited commercial communities are clearly identifiable as such in order to improve transparency and to facilitate the functioning of such industry initiatives; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient.
(31) Member States which allow the sending of unsolicited commercial communications by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.
(32) In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions might offer on the Internet, it is necessary that compliance be guaranteed at Community level with professional rules aiming, in particular, to protect consumers or public health; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations.
(33) This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field.
(34) Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; the examination of the legislation requiring such adjustment should be systematic and should cover all the necessary stages and acts of the contractual process, including the filing of the contract; the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is

dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures(24); the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for.
(24) OJ L 13, 19.1.2000, p. 12.

(35) This Directive does not affect Member States' possibility of maintaining or establishing general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures.
(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary.
(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases.
(38) Member States' obligation to remove obstacles to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law.
(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the bypassing of those provisions by providers of information society services.
(40) Both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.
(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.
(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.
(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.
(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.
(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

(49) Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties of deciding freely whether to adhere to such codes.

(50) It is important that the proposed directive on the harmonisation of certain aspects of copyright and related rights in the information society and this Directive come into force within a similar time scale with a view to establishing a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.

(51) Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.

(52) The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

(53) Directive 98/27/EC, which is applicable to information society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of information society services by ensuring a high level of consumer protection.

(54) The sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive.

(55) This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

(56) As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract.

(57) The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions

within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

(59) Despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the internal market, and for the establishment of an appropriate European regulatory framework; such coordination should also contribute to the establishment of a common and strong negotiating position in international forums.

(60) In order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.

(61) If the market is actually to operate by electronic means in the context of globalisation, the European Union and the major non-European areas need to consult each other with a view to making laws and procedures compatible.

(62) Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners.

(63) The adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the information society; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.

(64) Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields.

(65) The Council, in its resolution of 19 January 1999 on the consumer dimension of the information society(25), stressed that the protection of consumers deserved special attention in this field; the Commission will examine the degree to which existing consumer protection rules provide insufficient protection in the context of the information society and will identify, where necessary, the deficiencies of this legislation and those issues which could require additional measures; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified,

(25) OJ C 23, 28.1.1999, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I.
General provisions

Article 1. Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

5. This Directive shall not apply to:
(a) the field of taxation;
(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;
(c) questions relating to agreements or practices governed by cartel law;
(d) the following activities of information society services:
- the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

- the representation of a client and defence of his interests before the courts,
- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

Article 2. Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:
(a) "information society services": services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;
(b) "service provider": any natural or legal person providing an information society service;
(c) "established service provider": a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;
(d) "recipient of the service": any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;
(e) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;
(f) "commercial communication": any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications:
- information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,
- communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration;
(g) "regulated profession": any profession within the meaning of either Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three-years' duration(26) or of Article 1(f) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC(27);
(h) "coordinated field": requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.
(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:
- the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,
- the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;
(ii) The coordinated field does not cover requirements such as:
- requirements applicable to goods as such,
- requirements applicable to the delivery of goods,
- requirements applicable to services not provided by electronic means.

(26) OJ L 19, 24.1.1989, p. 16.
(27) OJ L 209, 24.7.1992, p. 25. Directive as last amended by Commission Directive 97/38/EC (OJ L 184, 12.7.1997, p. 31).

Article 3. Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:
(a) the measures shall be:

(i) necessary for one of the following reasons:
- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
- the protection of public health,
- public security, including the safeguarding of national security and defence,
- the protection of consumers, including investors;
(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;
(iii) proportionate to those objectives;
(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:
- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,
- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

CHAPTER II.
Principles

Section 1.
Establishment and information requirements

Article 4. Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services(28).
(28) OJ L 117, 7.5.1997, p. 15.

Article 5. General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:
(a) the name of the service provider;
(b) the geographic address at which the service provider is established;
(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
(f) as concerns the regulated professions:
- any professional body or similar institution with which the service provider is registered,
- the professional title and the Member State where it has been granted,
- a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment(29).

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

(29) OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 1999/85/EC (OJ L 277, 28.10.1999, p. 34).

Section 2. Commercial communications

Article 6. Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Article 7. Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

Article 8. Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, Member States and the Commission shall encourage professional associations and bodies to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of commercial communication in conformity with the rules referred to in paragraph 1.

3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close cooperation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3. Contracts concluded by electronic means

Article 9. Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such

contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10. Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11. Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:
- the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,
- the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4.
Liability of intermediary service providers

Article 12. "Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:
(a) does not initiate the transmission;
(b) does not select the receiver of the transmission; and
(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the

information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13. "Caching"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14. Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15. No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

CHAPTER III.
Implementation

Article 16. Codes of conduct

1. Member States and the Commission shall encourage:

(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;
(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;
(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

Article 17. Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Article 18. Court actions

1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

2. The Annex to Directive 98/27/EC shall be supplemented as follows:
"11. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1)."

Article 19. Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:
(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;
(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to information society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20. Sanctions

Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.

CHAPTER IV.
Final provisions

Article 21. Re-examination

1. Before 17 July 2003, and thereafter every two years, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the internal market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail.

Article 22. Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 17 January 2002. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Article 23. Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 24. Addressees

This Directive is addressed to the Member States.

Done at Luxemburg, 8 June 2000.

ANNEX.
Derogations from article 3

As provided for in Article 3(3), Article 3(1) and (2) do not apply to:
- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC(1) and Directive 96/9/EC(2) as well as industrial property rights,
- the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC(3),
- Article 44(2) of Directive 85/611/EEC(4),
- Article 30 and Title IV of Directive 92/49/EEC(5), Title IV of Directive 92/96/EEC(6), Articles 7 and 8 of Directive 88/357/EEC(7) and Article 4 of Directive 90/619/EEC(8),
- the freedom of the parties to choose the law applicable to their contract,
- contractual obligations concerning consumer contacts,
- formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated,
- the permissibility of unsolicited commercial communications by electronic mail.

(1) OJ L 24, 27.1.1987, p. 36.
(2) OJ L 77, 27.3.1996, p. 20.
(3) Not yet published in the Official Journal.
(4) OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 95/26/EC (OJ L 168, 18.7.1995, p. 7).
(5) OJ L 228, 11.8.1992, p. 1. Directive as last amended by Directive 95/26/EC.
(6) OJ L 360, 9.12.1992, p. 2. Directive as last amended by Directive 95/26/EC.
(7) OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 92/49/EC.
(8) OJ L 330, 29.11.1990, p. 50. Directive as last amended by Directive 92/96/EC.

DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2001 ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY

(Directive Copyright Information Society)

Official Journal L 167, 22 June 2001

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the Economic and Social Committee,
Acting in accordance with the procedure laid down in Article 251 of the Treaty,
Whereas:

(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the

functioning of the internal market need not be removed or prevented.

(8) The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.

(13) A common search for, and consistent application at European level of, technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law.

(14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

(16) Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce"), which clarifies and harmonises various legal issues relating to information society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

(17) It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.

(18) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.

(19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and

of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC, 92/100/EEC, 93/83/EEC, 93/98/EEC and 96/9/EC, and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the acquis communautaire. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all right holders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.

(29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.

(30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.

(31) A fair balance of rights and interests between the different categories of rightholders, as well as

between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.

(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

(36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

(37) Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differenc-

es between digital and analogue private copying and a distinction should be made in certain respects between them.

(39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.

(40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

(41) When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation.

(42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

(43) It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

(45) The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.

(46) Recourse to mediation could help users and rightholders to settle disputes. The Commission, in cooperation with the Member States within the Contact Committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights.

(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.

(48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devic-

es or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography.

(49) The legal protection of technological measures is without prejudice to the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures.

(50) Such a harmonised legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 of Directive 91/250/EEC. Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.

(51) The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by rightholders, including within the framework of agreements, or taken by a Member State, any technological measures applied in implementation of such measures should enjoy legal protection.

(52) When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

(53) The protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) should not apply. Non-interactive forms of online use should remain subject to those provisions.

(54) Important progress has been made in the international standardisation of technical systems of identification of works and protected subject-matter in digital format. In an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community. Compatibility and interoperability of the different systems should be encouraged. It would be highly desirable to encourage the development of global systems.

(55) Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to identify better the work or other subject-matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Rightholders should be encouraged to use markings indicating, in addition to the information referred to above, inter alia their

authorisation when putting works or other subject-matter on networks.

(56) There is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public works or other protected subject-matter from which such information has been removed without authority. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.

(57) Any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

(58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.

(61) In order to comply with the WIPO Performances and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I.
Objective and scope

Article 1. Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:
(a) the legal protection of computer programs;
(b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
(c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
(d) the term of protection of copyright and certain related rights;
(e) the legal protection of databases.

CHAPTER II.
Rights and exceptions

Article 2. Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:
(a) for authors, of their works;
(b) for performers, of fixations of their performances;
(c) for phonogram producers, of their phonograms;
(d) for the producers of the first fixations of films, in respect of the original and copies of their films;
(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are

transmitted by wire or over the air, including by cable or satellite.

Article 3. Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
(a) for performers, of fixations of their performances;
(b) for phonogram producers, of their phonograms;
(c) for the producers of the first fixations of films, of the original and copies of their films;
(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Article 4. Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Article 5. Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
(a) a transmission in a network between third parties by an intermediary, or
(b) a lawful use
of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
(c) reproduction by the press, communication to the public or making available of published arti-

cles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;
(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;
(g) use during religious celebrations or official celebrations organised by a public authority;
(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
(i) incidental inclusion of a work or other subject-matter in other material;
(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;
(k) use for the purpose of caricature, parody or pastiche;
(l) use in connection with the demonstration or repair of equipment;
(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;
(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III.
Protection of technological measures and rights-management information

Article 6. Obligations as to technological measures

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
(a) are promoted, advertised or marketed for the purpose of circumvention of, or
(b) have only a limited commercially significant purpose or use other than to circumvent, or
(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,
any effective technological measures.

3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or

restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply mutatis mutandis.

Article 7. Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

(a) the removal or alteration of any electronic rights-management information;

(b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subjectmatter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV.
Common provisions

Article 8. Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Article 9. Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

Article 10. Application over time

1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.

Article 11. Technical adaptations

1. Directive 92/100/EEC is hereby amended as follows:
(a) Article 7 shall be deleted;
(b) Article 10(3) shall be replaced by the following: "3. The limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

2. Article 3(2) of Directive 93/98/EEC shall be replaced by the following: "2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.
However, where through the expiry of the term of protection granted pursuant to this paragraph in its version before amendment by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society(11) the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew."

Article 12. Final provisions

1. Not later than 22 December 2004 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8 in the light of the development of the digital market. In the case of Article 6, it shall examine in particular whether that Article confers a sufficient level of protection and whether acts which are permitted by law are being adversely affected by the use of effective technological measures. Where necessary, in particular to ensure the functioning of the internal market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

2. Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.

3. A contact committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State.

4. The tasks of the committee shall be as follows:

(a) to examine the impact of this Directive on the functioning of the internal market, and to highlight any difficulties;

(b) to organise consultations on all questions deriving from the application of this Directive;

(c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments;

(d) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

Article 13. Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 22 December 2002. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

Article 14. Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 15. Addressees

This Directive is addressed to the Member States.

PROTOCOL ON THE SYSTEM OF PUBLIC BROADCASTING IN THE MEMBER STATES (1997)

Origin: Treaty of Amsterdam.

Protocol annexed to the Treaty establishing the European Community (1997)

THE HIGH CONTRACTING PARTIES,

CONSIDERING that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism;

HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty establishing the European Community,

The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.

RECOMMENDATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 DECEMBER 2006 ON THE PROTECTION OF MINORS AND HUMAN DIGNITY AND ON THE RIGHT OF REPLY IN RELATION TO THE COMPETITIVENESS OF THE EUROPEAN AUDIOVISUAL AND ON-LINE INFORMATION SERVICES INDUSTRY (2006/952/EC)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 157 thereof,

(...)

Whereas:

(1) The Charter of Fundamental Rights of the European Union [3] ("the Charter") declares in Article 1 the inviolability of human dignity, providing that it must be respected and protected. Article 24 of the Charter provides that children have the right to such protection and care as is necessary for their well-being and that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
[3] OJ C 364, 18.12.2000, p. 1.

(2) The European Union should gear its political action to preventing any form of violation of the principle of respect for human dignity.

(3) Legislative measures need to be enacted at Union level on the protection of the physical, mental and moral development of minors in relation to the content of all audiovisual and information services and the protection of minors from access to inappropriate adult programmes or services.

(4) The constant development of new information and communication technologies makes it urgent for the Community to ensure full and adequate protection for citizens' interests in this field on the one hand, by guaranteeing the free delivery and free provision of information services and, on the other hand, by ensuring that their content is legal, respects the principle of human dignity and does not impair the overall development of minors.

(5) The Community has already intervened in the field of audiovisual and information services in order to create the necessary conditions to ensure the free movement of television broadcasts and other information services, in compliance with the principles of free competition and freedom of expression and information, but it should act with greater determination in this area with the aim of adopting measures to protect consumers from incitement to discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation and of combating any such discrimination. Such action should strike a balance between the protection of individual rights on the one hand and freedom of expression on the other, in particular with respect to Member States' responsibility for defining the notion of incitement to hatred or discrimination in accordance with their national legislation and moral values.

(6) Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity [4] is the first legal instrument at Community level which in its recital (5) addresses issues of the protection of minors and of human dignity in relation to audiovisual and information services made available to the public, whatever the means of conveyance. Article 22 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [5] ("Television without Frontiers Directive") has already specifically addressed the question of the protection of minors and human dignity in television broadcasting activities.
[4] OJ L 270, 7.10.1998, p. 48.

[5] OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

(7) It is suggested that the Council and the Commission should pay special attention to the implementation of this Recommendation when revising, negotiating or concluding new partnership agreements or new cooperation programmes with third countries, bearing in mind the global character of producers, distributors or

providers of audiovisual content and Internet access.

(8) By Decision No 276/1999/EC [6], the European Parliament and the Council adopted a multiannual Community Action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks (the "Safer Internet Action Plan").

[6] Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks (OJ L 33, 6.2.1999, p. 1). Decision as last amended by Decision No 787/2004/EC (OJ L 138, 30.4.2004, p. 12).

(9) Decision No 1151/2003/EC of the European Parliament and of the Council [7] extended the Safer Internet Action Plan for two years and amended its scope to include measures to encourage exchange of information and coordination with the relevant actors at national level as well as special provisions for the accession countries.

[7] Decision No 1151/2003/EC of the European Parliament and of the Council of 16 June 2003 amending Decision No 276/1999/EC adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks (OJ L 162, 1.7.2003, p. 1).

(10) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [8] clarifies some legal concepts and harmonises certain aspects in order to enable information society services to fully benefit from the internal market principles. A number of the provisions of Directive 2000/31/EC are also relevant to the protection of minors and human dignity, in particular Article 16(1)(e), according to which Member States and the Commission are to encourage the drawing up of codes of conduct regarding the protection of minors and human dignity.

[8] OJ L 178, 17.7.2000, p. 1.

(11) The changing media landscape, resulting from new technologies and media innovation, makes it necessary to teach children, and also parents, teachers and trainers to use audiovisual and on-line information services effectively.

(12) On the whole, self-regulation of the audiovisual sector is proving an effective additional measure, but it is not sufficient to protect minors from messages with harmful content. The development of a European audiovisual area based on freedom of expression and respect for citizens' rights should be based on continuous dialogue between national and European legislators, regulatory authorities, industries, associations, citizens and civil society.

(13) In the public consultation concerning Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [9], it was suggested that the need to adopt measures in relation to media literacy be included among the subjects covered by Recommendation 98/560/EC.

[9] OJ L 202, 30.7.1997, p. 60.

(14) The Commission encourages cooperation and the sharing of experience and best practices between existing self- and co-regulatory bodies, which deal with the rating or classification of audiovisual content, regardless of the means by which it is delivered, with a view to enabling all users, but especially parents, teachers and trainers, to report illegal content and assess the content of audiovisual and on-line information services, as well as any legal content which could harm the physical, mental or moral development of minors.

(15) As suggested during the public consultation concerning Directive 97/36/EC, it is appropriate for the right of reply or equivalent remedies to apply to on-line media, and to take into account the specific features of the medium and service concerned.

(16) The Council Resolution of 5 October 1995 on the image of women and men portrayed in advertising and the media [10] invites the Member States and the Commission to take adequate measures to promote a diversified and realistic picture of the skills and potential of women and men in society.

[10] OJ C 296, 10.11.1995, p. 15.

(17) When tabling its proposal for a Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services, the Commission noted that the portrayal of the sexes in the media and in advertising raises important questions about the protection of the dignity of men and women, but concluded that, in the light of other fundamental rights, including the freedom and pluralism of the media, it would not be appropriate to address these questions in that pro-

posal but that it should take stock of these questions.

(18) The audiovisual and on-line information services industry should be encouraged at Member State level to avoid and to combat any type of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in such media and all advertising, including new advertising techniques, without infringing freedom of expression or of the press.

(19) This Recommendation covers new technological developments and complements Recommendation 98/560/EC. Its scope, on account of technological advances, includes audiovisual and on-line information services made available to the public via fixed or mobile electronic networks.

(20) Nothing in this Recommendation prevents Member States from applying their constitutional provisions and other legislation and legal practices regarding freedom of expression,

HEREBY RECOMMEND THAT:

I. The Member States, in the interests of promoting the development of the audiovisual and on-line information services industry, take the necessary measures to ensure the protection of minors and human dignity in all audiovisual and on-line information services by:

1. considering the introduction of measures into their domestic law or practice regarding the right of reply or equivalent remedies in relation to on-line media, with due regard for their domestic and constitutional legislative provisions, and without prejudice to the possibility of adapting the manner in which it is exercised to take into account the particularities of each type of medium;

2. promoting, in order to encourage the take-up of technological developments, in addition to and consistently with existing legal and other measures regarding broadcasting services, and in close cooperation with the parties concerned:
(a) action to enable minors to make responsible use of audiovisual and on-line information services, notably by improving the level of awareness among parents, teachers and trainers of the potential of the new services and of the means whereby they may be made safe for minors, in particular through media literacy or media education programmes and, for instance, by continuous training within school education,
(b) action to facilitate, where appropriate and necessary, the identification of, and access to, quality content and services for minors, including through the provision of means of access in educational establishments and public places,
(c) action to inform citizens more about the possibilities offered by the Internet;
examples of possible actions concerning media literacy are outlined in Annex II;

3. promoting a responsible attitude on the part of professionals, intermediaries and users of new communication media such as the Internet by:
(a) encouraging the audiovisual and on-line information services industry, without infringing freedom of expression or of the press, to avoid all discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, in all audiovisual and on-line information services, and to combat such discrimination,
(b) encouraging vigilance and the reporting of pages considered illegal, without prejudice to Directive 2000/31/EC,
(c) drawing up a code of conduct in cooperation with professionals and regulatory authorities at national and Community level;

4. promoting measures to combat all illegal activities harmful to minors on the Internet and make the Internet a much more secure medium; consideration could be given inter alia to the following measures:
(a) adopting a quality label for service providers, so that users can easily check whether or not a given provider subscribes to a code of conduct,
(b) establishing appropriate means for the reporting of illegal and/or suspicious activities on the Internet.

II. The audiovisual and on-line information services industry and other parties concerned:

1. develop positive measures for the benefit of minors, including initiatives to facilitate their wider access to audiovisual and on-line information services, while avoiding potentially harmful content, for instance by means of filtering systems. Such measures could include harmonisation through cooperation between the regulatory, self-regulatory and co-regulatory bodies of the Member States, and through the exchange of best practices concerning such issues as a system of common descriptive symbols or warning messages indicating the age category and/or which aspects of the content have led to a certain age recommendation, which would help users to assess the content of audiovisual and on-line informa-

tion services. This could take place, for instance, through the actions outlined in Annex III;

2. examine the possibility of creating filters which would prevent information offending against human dignity from passing through the Internet;

3. develop measures to increase the use of content labelling systems for material distributed over the Internet;

4. consider effective means of avoiding and combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in audiovisual and on-line information services and of promoting a diversified and realistic picture of the skills and potential of men and women in society.

TAKE NOTE THAT THE COMMISSION:

1. Intends to promote, in connection with the 2005-2008 multiannual Community programme on promoting safer use of the Internet and new on-line technologies, information actions aimed at citizens Europe-wide using all communications media, to inform the public about the benefits and possible risks of the Internet, how to use it responsibly and safely, how to make complaints and how to activate parental control. Specific campaigns could be aimed at target groups such as schools, parents' associations and users;

2. intends to explore the possibility of introducing a European freephone number or of extending an existing service to assist Internet users by directing them to available complaint mechanisms and information resources and providing information for parents about the effectiveness of filtering software;

3. intends to explore the possibility of supporting the establishment of a generic second level domain name reserved for monitored sites committed to respecting minors and their rights, such as.KID.eu;

4. continues to maintain a constructive and ongoing dialogue with content providers' organisations, consumer organisations and all parties concerned;

5. intends to facilitate and support the formation of networks by self-regulatory bodies and the exchanging of experience among them, so as to assess the effectiveness of codes of conduct and approaches based on self-regulation in order to ensure the highest possible standards of protection for minors;

6. intends to submit to the European Parliament and the Council, on the basis of information supplied by the Member States, a report on the implementation and effectiveness of the measures specified in this Recommendation, and to review this Recommendation if and when the need arises.

(...)

ANNEX I. Indicative guidelines for the implementation, at national level, of measures in domestic law or practice so as to ensure the right of reply or equivalent remedies in relation to on-line media

Objective: introducing measures in the domestic law or practice of the Member States in order to ensure the right of reply or equivalent remedies in relation to on-line media, with due regard for their domestic and constitutional provisions and without prejudice to the possibility of adjusting its exercise to the particularities of each type of medium.

The term "medium" refers to any means of communication for dissemination to the public of edited information on-line such as newspapers, periodicals, radio, television and Internet-based news services.

Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular, but not limited to, reputation and good name, have been affected by an assertion of facts in a publication or transmission should have the right of reply or equivalent remedies. Member States should ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions.

The right of reply or equivalent remedies should exist in relation to on-line media under the jurisdiction of a Member State.

Member States should adopt the measures needed to establish the right of reply or equivalent remedies and should determine the procedure to be followed for the exercise thereof. In particular, they should ensure that a sufficient time span is allowed and that the procedures are such that the right of reply or equivalent remedies can be exercised appropriately by natural or

legal persons resident or established in other Member States.
The right of reply can be ensured not only through legislation, but also through co-regulatory or self-regulatory measures.
The right of reply is a particularly appropriate remedy in the on-line environment because it allows for an instant response to contested information and it is technically easy to attach the replies from the persons affected. However, the reply should be within a reasonable time after the request has been substantiated and at a time and in a manner appropriate to the publication or transmission to which the request refers.
Provision should be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies could be subject to review by the courts or similar independent bodies.
An application for exercise of right of reply or the equivalent remedies may be rejected if the claimant does not have a legitimate interest in the publication of such a reply, or if the reply would involve a punishable act, would render the content provider liable to civil law proceedings or would transgress standards of public decency.
The right of reply is without prejudice to other remedies available to persons whose right to dignity, honour, reputation or privacy have been breached by the media.

ANNEX II. Examples of possible actions concerning media literacy

(a) continuing education of teachers and trainers, in liaison with child protection associations, on using the Internet in the context of school education so as to maintain awareness of the possible risks of the Internet with particular regard to chatrooms and fora;
(b) introduction of specific Internet training aimed at children from a very early age, including sessions open to parents;
(c) an integrated educational approach forming part of school curricula and media literacy programmes, so as to provide information on using the Internet responsibly;
(d) organisation of national campaigns aimed at citizens, involving all communications media, to provide information on using the Internet responsibly;
(e) distribution of information packs on possible risks of the Internet ("how to surf the Internet safely", "how to filter unwanted messages") and the setting up of hotlines to which reports or complaints concerning harmful or illegal content could be addressed;
(f) adequate measures to establish or improve the performance of telephone hotlines, so as to make it easier to lodge complaints and to make it possible to report harmful or illegal content.

ANNEX III. Examples of possible actions by the industries and the parties concerned for the benefit of minors

(a) systematically providing users with an effective, updatable and easy-to-use filtering system when they subscribe to an access provider;
(b) offering access to services specifically intended for children which are equipped with automatic filtering systems operated by access providers and mobile telephone operators;
(c) introducing incentives to provide a regularly updated description of the sites available, making it easier to classify sites and assess their content;
(d) posting banners on search engines drawing attention to the availability both of information about responsible use of the Internet and of telephone hotlines.

COMMUNICATION FROM THE COMMISSION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING (2 JULY 2009)

(Text with EEA relevance)

Official Journal C 257, 27 October 2009

1. INTRODUCTION AND SCOPE OF THE COMMUNICATION

1. Over the last three decades, broadcasting has undergone important changes. The abolition of monopolies, the emergence of new players and rapid technological developments have fundamentally altered the competitive environment. Television broadcasting was traditionally a reserved activity. Since its inception, it has mostly been provided by public undertakings under a monopoly regime, mainly as a consequence of the limited availability of broadcasting frequencies and the high barriers to entry.

2. In the 1970s, however, economic and technological developments made it increasingly possible for Member States to allow other operators to broadcast. Member States have therefore decided to introduce competition in the market. This has led to a wider choice for consumers, as many additional channels and new services became available; it has also favoured the emergence and growth of strong European operators, the development of new technologies, and a larger degree of pluralism in the sector, which means more than a simple availability of additional channels and services. Whilst opening the market to competition, Member States considered that public service broadcasting ought to be maintained, as a way to ensure the coverage of a number of areas and the satisfaction of needs and public policy objectives that would otherwise not necessarily be fulfilled to the optimal extent. This was confirmed in the interpretative protocol on the system of public broadcasting in the Member States, annexed to the EC Treaty (hereinafter referred to as the Amsterdam Protocol).

3. At the same time, the increased competition, together with the presence of State-funded operators, has also led to growing concerns for a level playing field, which have been brought to the Commission's attention by private operators. The complaints allege infringements of Articles 86 and 87 of the EC Treaty in relation to public funding of public service broadcasters.

4. The 2001 Communication from the Commission on the application of State aid rules to public service broadcasting [1] has first set out the framework governing State funding of public service broadcasting. The 2001 Communication has served as a good basis for the Commission to develop significant decision-making practice in the field. Since 2001, more than 20 decisions have been adopted concerning the financing of public service broadcasters.

5. In the meantime, technological changes have fundamentally altered the broadcasting and audiovisual markets. There has been a multiplication of distribution platforms and technologies, such as digital television, IPTV, mobile TV and video on demand. This has led to an increase in competition with new players, such as network operators and Internet companies, entering the market. Technological developments have also allowed the emergence of new media services such as online information services and non-linear or on-demand services. The provision of audiovisual services is converging, with consumers being increasingly able to obtain multiple services on a single platform or device or to obtain any given service on multiple platforms or devices. The increasing variety of options for consumers to access media content has led to the multiplication of audiovisual services offered and the fragmentation of audiences. New technologies have enabled improved consumer participation. The traditional passive consumption model has been gradually turning into active participation and control over content by consumers. In order to keep up with the new challenges, both public and private broadcasters have been diversifying their activities, moving to new distribution platforms and expanding the range of their services. Most recently, this diversification of the publicly funded activities of public service broadcasters (such as online content, special interest channels) prompted a number of complaints by other market players also including publishers.

6. Since 2001, important legal developments have also taken place, which have an impact on the broadcasting field. In the 2003 Altmark judgment [2], the European Court of Justice defined the conditions under which public service compensation does not constitute State aid. In 2005, the Commission adopted a new decision [3] and framework [4] on State aid in the form of public service compensation. In 2007, the Commission adopted a Communication accompanying the

Communication on "A single market for 21st century Europe" — Services of general interest, including social services of general interest: a new European Commitment [5]. Furthermore, in December 2007, the Audiovisual Media Services Directive [6] entered into force, extending the scope of the EU audiovisual regulation to emerging media services.

7. These changes in the market and in the legal environment have called for an update to the 2001 Communication on State aid for public broadcasting. The Commission's 2005 State Aid Action Plan [7] announced that the Commission would "revisit its Communication on the application of State aid rules to public service broadcasting. Notably with the development of new digital technologies and of Internet-based services, new issues have arisen regarding the scope of public service activities".

8. In the course of 2008 and 2009, the Commission held several public consultations on the review of the 2001 Broadcasting Communication. The present Communication consolidates the Commission's case practice in the field of State aid in a future-orientated manner based on the comments received in the public consultations. It clarifies the principles followed by the Commission in the application of Articles 87 and 86(2) of the EC Treaty to the public funding of audiovisual services in the broadcasting sector [8], taking into account recent market and legal developments. The present Communication is without prejudice to the application of the internal market rules and fundamental freedoms in the field of broadcasting.

2. THE ROLE OF PUBLIC SERVICE BROADCASTING

9. Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.

10. Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 11 of the Charter of Fundamental Rights of the European Union [9] and Article 10 of the European Convention of Human Rights, a general principle of law the respect of which is ensured by the European Courts [10].

11. The role of the public service [11] in general is recognised by the Treaty, in particular Articles 16 and 86(2). The interpretation of these provisions in the light of the particular nature of the broadcasting sector is outlined in the Amsterdam Protocol, which, after considering "that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism", states that "the provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".

12. The importance of public service broadcasting for social, democratic and cultural life in the Union was reaffirmed in the Council Resolution concerning public service broadcasting. As underlined by the Resolution "broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting". Moreover, public service broadcasting needs to "benefit from technological progress", bring "the public the benefits of the new audiovisual and information services and the new technologies" and to undertake "the development and diversification of activities in the digital age". Finally, "public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences" [12].

13. The role of public service broadcasting in promoting cultural diversity was also recognised by

the 2005 Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was approved by the Council on behalf of the Community and thus forms part of EC law [13]. The Convention states that each party may adopt "measures aimed at protecting and promoting the diversity of cultural expressions within its territory". Such measures may include, among others, "measures aimed at enhancing diversity of the media, including through public service broadcasting" [14].

14. These values of public broadcasting are equally important in the rapidly changing new media environment. This has also been highlighted in the recommendations of the Council of Europe concerning media pluralism and diversity of media content [15], and the remit of public service media in the information society [16]. The latter recommendation calls upon the members of the Council of Europe to "guarantee public service media (...) in a transparent and accountable manner" and to "enable public service media to respond fully and effectively to the challenges of the information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions"

15. In its Resolution on concentration and pluralism in the media in the European Union, the European Parliament has recommended that "regulations governing State aid are devised and implemented in a way which allow the public service and community media to fulfil their function in a dynamic environment, while ensuring that public service media carry out the function entrusted to them by Member States in a transparent and accountable manner, avoiding the abuse of public funding for reasons of political or economic expediency" [17].

16. At the same time and notwithstanding the above, it must be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a significant role in achieving the objectives of the Amsterdam Protocol to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes. Moreover, newspaper publishers and other print media are also important guarantors of an objectively informed public and of democracy. Given that these operators are now competing with broadcasters on the Internet, all these commercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of new business models. As recalled by the Audiovisual Media Services Directive [18], "the coexistence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market." Indeed, it is in the common interest to maintain a plurality of balanced public and private media offer also in the current dynamic media environment.

3. THE LEGAL CONTEXT

17. The application of State aid rules to public service broadcasting has to take into account a wide number of different elements. The State aid assessment is based on Articles 87 and 88 on State aid and Article 86(2) on the application of the rules of the Treaty and the competition rules, in particular, to services of general economic interest. The Treaty of Maastricht introduced Article 151 concerning culture and Article 87(3)(d) on aid to promote culture. The Treaty of Amsterdam introduced a specific provision (Article 16) on services of general economic interest and the Amsterdam Protocol on the system of public broadcasting in the Member States.

18. The regulatory framework concerning "audiovisual media services" is coordinated at European level by the Audiovisual Media Services Directive. The financial transparency requirements concerning public undertakings are regulated by the Transparency Directive [19].

19. These rules are interpreted by the Court of Justice and the Court of First Instance. The Commission has also adopted several communications on the application of the State aid rules. In particular, in 2005, the Commission adopted the Services of General Economic Interest Framework [20] and Decision [21] clarifying the requirements of Article 86(2) of the EC Treaty. The latter is also applicable in the field of broadcasting, to the extent that the conditions provided in Article 2(1)(a) of the Decision are met [22].

4. APPLICABILITY OF ARTICLE 87(1)

4.1. The State aid character of State financing of public service broadcasters

20. In line with Article 87(1), the concept of State aid includes the following conditions: (a) there must be an intervention by the State or by means of State resources; (b) the intervention must be liable to affect trade between Member States; (c) it must confer an advantage of the beneficiary; (d)

it must distort or threaten to distort competition [23]. The existence of State aid has to be assessed on an objective basis, taking into account the jurisprudence of the Community Courts.

21. The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 87(1). Public service broadcasters are normally financed out of the State budget or through a levy on broadcasting equipment holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources [24].

22. State financing of public service broadcasters can also be generally considered to affect trade between Member States. As the Court of Justice has observed, "when aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid" [25]. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public service broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State. Furthermore, services provided on the internet normally have a global reach.

23. Regarding the existence of an advantage, the Court of justice clarified in the Altmark case [26] that public service compensation does not constitute State aid provided that four cumulative conditions are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the community, the level of compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.

24. To the extent that the funding fails to satisfy the above conditions, it would be considered as selectively favouring only certain broadcasters and thereby distorting or threatening to distort competition.

4.2. Nature of the aid: existing aid as opposed to new aid

25. The funding schemes currently in place in most of the Member States were introduced a long time ago. As a first step, therefore, the Commission must determine whether these schemes may be regarded as "existing aid" within the meaning of Article 88(1). In line with this provision, "the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market".

26. Pursuant to Article 1(b)(i) of the Procedural Regulation [27], existing aid includes "... all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty".

27. In the cases of Austria, Finland and Sweden, State aid measures introduced before the entry into force of the EEA Agreement on 1 January 1994 in these countries is regarded as existing aid. Regarding the 10 Member States which acceded in 2004 (the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia) and Bulgaria and Romania which acceded in 2007, measures put into effect before 10 December 1994, those included in the list annexed to the Treaty of Accession and those approved under the so-called "interim procedure" are considered as existing aid.

28. Pursuant to Article 1(b)(v) of the Procedural Regulation, existing aid also includes "aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State".

29. In accordance with the case law of the Court [28], the Commission must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Commission believes that a case by case approach is the most appropriate [29], taking into account all the elements related to the broadcasting system of a given Member State.

30. According to the case law in Gibraltar [30], not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Court of First Instance, "it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme."

31. In light of the above considerations, in its decision-making practice the Commission has generally examined: (a) whether the original financing regime for public service broadcasters is existing aid in line with the rules indicated in paragraphs 26 and 27 above; (b) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and (c) in case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure is as a whole transformed into a new aid.

5. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 87(3)

32. Although compensation for public service broadcasting is typically assessed under Article 86(2) of the Treaty, the derogations listed in Article 87(3) may in principle also apply in the field of broadcasting, provided that the relevant conditions are met.

33. In accordance with Article 151(4) of the Treaty, the Community is to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures. Article 87(3)(d) of the Treaty allows the Commission to regard aid to promote culture as compatible with the common market where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

34. It is the Commission's task to decide on the actual application of that provision in the same way as for the other exemption clauses in Article 87(3). It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Accordingly, the Commission considers that the cultural derogation may be applied in those cases where the cultural product is clearly identified or identifiable [31]. Moreover, the Commission takes the view that the notion of culture must be applied to the content and nature of the product in question, and not to the medium or its distribution per se [32]. Furthermore, the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture under Article 87(3)(d) [33].

35. State aid to public service broadcasters usually does not differentiate between cultural, democratic and educational needs of society. Unless a funding measure is specifically aimed at promoting cultural objectives, Article 87(3)(d) would generally not be relevant. State aid to public service broadcasters is generally provided in the form of compensation for the fulfilment of the public service mandate and is assessed under Article 86(2), on the basis of the criteria set out in the present Communication.

6. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 86(2)

36. In accordance with Article 86(2), "undertakings entrusted with the operation of services of general economic interest or having the character of revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

37. The Court has consistently held that Article 86 provides for a derogation and must therefore be interpreted restrictively. The Court has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions be fulfilled:

(i) the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition) [34];

(ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment) [35];

(iii) the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test) [36].

38. In the specific case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol, which refers to the "public service remit as conferred, defined and organised by each Member State" (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting "insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit (...) and (...) does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account" (proportionality).

39. It is for the Commission, as guardian of the Treaty, to assess, on the basis of evidence provided by the Member States, whether these criteria are satisfied. As regards the definition of the public service remit, the role of the Commission is to check for manifest errors (see Section 6.1). The Commission further verifies whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations (see Section 6.2).

40. In carrying out the proportionality test, the Commission considers whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding. The Commission assesses, in particular on the basis of the evidence that Member States are bound to provide whether there are sufficient guarantees to avoid disproportionate effects of public funding, overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities (see Section 6.3 and following).

41. The analysis of the compliance with the State aid requirements must be based on the specific characteristics of each national system. The Commission is aware of the differences in the national broadcasting systems and in the other characteristics of the Member States' media markets. Therefore, the assessment of the compatibility of State aid to public service broadcasters under Article 86(2) is made on a case-by-case basis, according to Commission practice [37], in line with the basic principles set out in the following sections.

42. The Commission will also take into account the difficulty some smaller Member States may have to collect the necessary funds, if costs per inhabitant of the public service are, ceteris paribus, higher [38] while equally considering potential concerns of other media in these Member States.

6.1. Definition of public service remit

43. In order to meet the condition mentioned in point 37(i) for application of Article 86(2), it is necessary to establish an official definition of the public service mandate. Only then can the Commission assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable.

44. Definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level, in accordance with their national legal order. Generally speaking, in exercising that competence, account must be taken of the Community concept of "services of general economic interest".

45. The definition of the public service mandate by the Member States should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

46. Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities. Moreover, the terms of the public service remit should be sufficiently precise, so that Member States' authorities can effectively monitor compliance, as described in the following chapter.

47. At the same time, given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 86(2) [39]. Such a definition is generally considered consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity. As expressed by the Court of First Instance, the legitimacy of such a widely defined public service remit rests upon the qualitative requirements for the services offered by a public service broadcaster [40]. The definition of the public service remit may also reflect the development and diversification of activities in the digital age and include audiovisual services on all distribution platforms.

48. As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide which programmes are to be provided and financed as a service of general economic interest, nor to question the nature or the quality of a certain product. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet — in the wording of the Amsterdam Protocol — the "democratic, social and cultural needs of each society". That would normally be the position in the case of advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games [41], sponsoring or merchandising, for example. Moreover, a manifest error could occur where State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society.

49. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot be viewed as part of the public service remit [42].

6.2. Entrustment and supervision

50. In order to benefit from the exemption under Article 86(2), the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or binding terms of reference).

51. The entrustment act(s) shall specify the precise nature of the public service obligations in line with Section 6.1 above, and shall set out the conditions for providing the compensation, as well as the arrangements for avoiding and repaying any overcompensation.

52. Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment Act(s) should be modified accordingly, within the limits of Article 86(2). In the interest of allowing public service broadcasters to react swiftly to new technological developments, Member States may also foresee that the entrustment with a new service is provided following the assessment outlined in Part 6.7 below, before the original entrustment Act is formally consolidated.

53. It is not sufficient, however, that the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitors its application in a transparent and effective manner. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. In accordance with the Commission communication on the principles and guidelines for the Community's audiovisual policy in the digital era [43] , it is not for the Commission to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the Member States of compliance by the broadcaster with its public service remit including the qualitative standards set out in that remit [44].

54. In line with the Amsterdam Protocol, it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Commission to carry out its tasks under Article 86(2). Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which

has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations.

55. In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

6.3. Choice of funding of public service broadcasting

56. Public service duties may be either quantitative or qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred.

57. Funding schemes can be divided into two broad categories "single-funding" and "dual-funding". The "single-funding" category comprises those systems in which public service broadcasting is financed only through public funds, in whatever form. "Dual-funding" systems comprise a wide range of schemes, where public service broadcasting is financed by different combinations of State funds and revenues from commercial or public service activities, such as the sale of advertising space or programmes and the offering of services against payment.

58. As stated in the Amsterdam Protocol: "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting (...)". The Commission has therefore no objection in principle to the choice of a dual financing scheme rather than a single funding scheme.

59. While Member States are free to choose the means of financing public service broadcasting, the Commission has to verify, under Article 86(2), that the State funding does not affect competition in the common market in a disproportionate manner, as referred to in paragraph 38 above.

6.4. Transparency requirements for the State aid assessment

60. The State aid assessment by the Commission requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities including a clear separation of accounts.

61. Separation of accounts between public service activities and non-public service activities is normally already required at national level as it is essential to ensure transparency and accountability when using public funds. A separation of accounts provides a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86(2) and the Amsterdam Protocol.

62. Member States are required by Directive 2006/111/EC to take transparency measures in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving public service compensation in any form whatsoever in relation to such service and which carries out other activities, that is to say, non-public service activities. These transparency requirements are: (a) the internal accounts corresponding to different activities, i.e. public service and non-public service activities must be separate; (b) all costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained must be clearly established [45].

63. These general transparency requirements apply also to broadcasters, insofar as they are entrusted with the operation of a service of general economic interest, receive public compensation in relation to such service, and also carry out other, non-public-service activities.

64. In the broadcasting sector, separation of accounts poses no particular problem on the revenue side. For this reason, the Commission considers that, on the revenue side, broadcasting operators should give detailed account of the sources and amount of all income accruing from the performance of public and non-public service activities.

65. On the cost side, all the expenses incurred in the operation of the public service may be taken into consideration. Where the undertaking carries out activities falling outside the scope of the public service, only the costs associated with the

public service may be taken into consideration. The Commission recognises that, in the public broadcasting sector, separation of accounts may be more difficult on the cost side. This is because, in particular in the field of traditional broadcasting, Member States may consider the whole programming of a broadcaster covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, public service and non-public service activities may share the same inputs to a large extent and the costs may not always be severable in a proportionate manner.

66. Costs specific to non-public service activities (e.g. the marketing cost of advertising) should always be clearly identified and separately accounted. In addition, input costs which are intended to serve the development of activities in the field of public and non-public services simultaneously should be allocated proportionately to public service and non-public service activities respectively, whenever it is possible in a meaningful way.

67. In other cases, whenever the same resources are used to perform public service and non-public service tasks, the common input costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities [46]. In such cases, costs that are entirely attributable to public service activities, while benefiting also non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. This difference to the approach generally followed in other utilities sectors is explained by the specificities of the public broadcasting sector. In the field of public broadcasting, the net benefits of commercial activities related to the public service activities have to be taken into account for the purpose of calculating the net public service costs and therefore to reduce the public service compensation level. This reduces the risk of cross-subsidisation by means of accounting common costs to public service activities.

68. The main example for the situation described in the preceding paragraph would be the cost of producing programmes in the framework of the public service mission of the broadcaster. These programmes serve both to fulfil the public service remit and to generate audience for selling advertising space. However, it is virtually impossible to quantify with a sufficient degree of precision how much of the program viewing fulfils the public service remit and how much generates advertising revenue. For this reason, the distribution of the cost of programming between the two activities risks being arbitrary and not meaningful.

69. The Commission considers that financial transparency can be further enhanced by an adequate separation between public service and non-public service activities at the level of the organisation of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidisation of commercial activities from the outset and to ensure transfer pricing and the respect of the arm's length principle. Therefore, the Commission invites Member States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice.

6.5. Net cost principle and overcompensation

70. As a matter of principle, since overcompensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State subject to the clarifications provided in the present chapter with regard to public service broadcasting.

71. The Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy the proportionality test, it is as a general rule necessary that the amount of public compensation does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit of all commercial activities related to the public service activity will be taken into account in determining the net public service costs.

72. Undertakings receiving compensation for the performance of a public service task may, in general, enjoy a reasonable profit. This profit consists of a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking. In the broadcasting sector the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed and do not perform any other activity than the provision of the public service. The Commission considers that in these situations, it is not reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission [47]. However, in other cases, for

example where specific public service obligations are entrusted to commercially run undertakings which need to remunerate the capital invested in them, a profit element which represents the fair remuneration of capital taking into account risk may be considered reasonable, if duly justified and provided that it is necessary for the fulfilment of the public service obligations.

73. Public service broadcasters may retain yearly overcompensation above the net costs of the public service (as public service reserves) to the extent that this is necessary for securing the financing of their public service obligations. In general, the Commission considers that an amount of up to 10 % of the annual budgeted expenses of the public service mission may be deemed necessary to withstand cost and revenue fluctuations. As a rule, overcompensation above this limit must be recovered without undue delay.

74. By way of exception, public service broadcasters may be allowed to keep an amount in excess of 10 % of the annual budgeted expenses of their public service mission in duly justified cases. This is only acceptable provided that this overcompensation is specifically earmarked in advance of and in a binding way for the purpose of a non-recurring, major expense necessary for the fulfilment of the public service mission [48]. The use of such clearly earmarked overcompensation should also be limited in time depending on its dedication.

75. In order to allow the Commission to exercise its duties, Member States shall lay down the conditions under which the above overcompensation may be used by the public service broadcasters.

76. The overcompensation mentioned above shall be used for the purpose of financing public service activities, only. Cross-subsidisation of commercial activities is not justified and constitutes incompatible State aid.

6.6. Financial control mechanisms

77. Member States shall provide for appropriate mechanisms to ensure that there is no overcompensation, subject to the provisions of paragraphs 72 to 76. They shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of "public service reserves". It is within the competence of Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, taking also into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit.

78. Such control mechanisms would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis. Member States shall make sure that effective measures can be put in place to recover overcompensation going beyond the provisions of the previous Chapter 6.5 and cross-subsidisation.

79. The financial situation of the public service broadcasters should be subject to an in-depth review at the end of each financing period as provided for in the national broadcasting systems of the Member States, or in the absence thereof, a time period which normally should not exceed four years. Any "public service reserves" existing at the end of the financing period, or of an equivalent period as provided above, shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period. In case of "public service reserves" exceeding 10 % of the annual public service costs on a recurring basis, Member States shall review whether the level of funding is adjusted to the public service broadcasters' actual financial needs.

6.7. Diversification of public broadcasting services

80. In recent years, audiovisual markets have undergone important changes, which have led to the ongoing development and diversification of the broadcasting offer. This has raised new questions concerning the application of the State aid rules to audiovisual services which go beyond broadcasting activities in the traditional sense.

81. In this respect, the Commission considers that public service broadcasters should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit of society. In order to guarantee the fundamental role of public service broadcasters in the new digital environment, public service broadcasters may use State aid to provide audiovisual services over new distribution platforms, catering for the general public as well as for special interests, provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.

82. In parallel with the rapid evolution of the broadcasting markets, the business models of broadcasters are also undergoing changes. In fulfilling their public service remit, broadcasters are increasingly turning to new sources of financing, such as online advertising or the provision of services against payment (so-called pay-services, like access to archives for a fee, special interest TV channels on a pay-per-view basis, access to mobile services for a lump sum payment, deferred access to TV programmes for a fee, paid online content downloads, etc.). The remuneration element in pay services can be related, for example, to the payment of network distribution fees or copyrights by broadcasters (for example if services over mobile platforms are provided against payment of a mobile distribution fee).

83. Although public broadcasting services have traditionally been free-to-air, the Commission considers that a direct remuneration element in such services — while having an impact on access by viewers [49] — does not necessarily mean that these services are manifestly not part of the public service remit provided that the pay element does not compromise the distinctive character of the public service in terms of serving the social, democratic and cultural needs of citizens, which distinguishes public services from purely commercial activities [50]. The element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit, as it may affect the universality and the overall design of the service provided as well as its impact on the market. Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society without leading to disproportionate effects on competition and cross-border trade, Member States may entrust public service broadcasters with such a service as part of their public service remit.

84. As set out above, State aid to public service broadcasters may be used for distributing audiovisual services on all platforms provided that the material requirements of the Amsterdam Protocol are met. To this end, Member States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition.

85. It is up to the Member States to determine, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster, what shall qualify as "significant new service". The "new" nature of an activity may depend among others on its content as well as on the modalities of consumption [51]. The "significance" of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services shall be subject to the same assessment as significant new services.

86. It is within the competence of the Member States to choose the most appropriate mechanism to ensure the consistency of audiovisual services with the material conditions of the Amsterdam Protocol, taking into account the specificities of their national broadcasting systems, and the need to safeguard editorial independence of public service broadcasters.

87. In the interest of transparency and of obtaining all relevant information necessary to arrive at a balanced decision, interested stakeholders shall have the opportunity to give their views on the envisaged significant new service in the context of an open consultation. The outcome of the consultation, its assessment as well as the grounds for the decision shall be made publicly available.

88. In order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, Member States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. This impact needs to be balanced with the value of the services in question for society. In the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society [52], taking also into account the existing overall public service offer.

89. Such an assessment would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. Member States shall be able to design a procedure which is proportionate to the size of the market and the market position of the public service broadcaster.

90. The considerations outlined above shall not prevent public service broadcasters from testing innovative new services (e.g. in the form of pilot projects) on a limited scale (e.g. in terms of time and audience) and for the purpose of gathering information on the feasibility of and the value added by the foreseen service, insofar as such test phase does not amount to the introduction of a fully-fledged, significant new audiovisual service.

91. The Commission considers that the above assessment at the national level will contribute to ensuring compliance with the EC State aid rules. This is without prejudice to the competences of the Commission to verify that Member States respect the Treaty provisions, and to its right to act, whenever necessary, also on the basis of complaints or on its own initiative.

6.8. Proportionality and market behaviour

92. In accordance with the Amsterdam Protocol, public service broadcasters shall not engage in activities which would result in disproportionate distortions of competition that are not necessary for fulfilling the public service mission. For example, the acquisition of premium content as part of the overall public service mission of public service broadcasters is generally considered legitimate. However, disproportionate market distortions would arise in the event that public service broadcasters were to maintain exclusive premium rights unused without offering to sublicense them in a transparent and timely manner. Therefore, the Commission invites Member States to ensure that public service broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights, and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters.

93. When carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm's length relations with these subsidiaries. Member States shall ensure that public service broadcasters respect the arm's length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding.

94. An example of anti-competitive practice may be price undercutting. A public service broadcaster might be tempted to depress the prices of advertising or other non-public service activities (such as commercial pay services) below what can reasonably be considered to be market-conform, so as to reduce the revenue of competitors, insofar as the resulting lower revenues are covered by the public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest" and thus infringe the Amsterdam Protocol.

95. In view of the differences between the market situations, the respect of the market principles by public service broadcasters, in particular the questions whether public service broadcasters are undercutting prices in their commercial offer, or whether they are respecting the principle of proportionality with regard to the acquisition of premium rights [53] , shall be assessed on a case-by-case basis, taking into account the specificities of the market and of the service concerned.

96. The Commission considers that it is, in the first place, up to the national authorities to ensure that public service broadcasters respect market principles. To this end, Member States shall have appropriate mechanisms in place which allow assessing any potential complaint in an effective way at the national level.

97. Notwithstanding the preceding paragraph, where necessary, the Commission may take action on the basis of Articles 81, 82, 86 and 87 of the EC Treaty.

7. TEMPORAL APPLICATION

98. This Communication will be applied from the first day following its publication in the Official Journal of the European Union. It will replace the 2001 Communication from the Commission on the application of State aid rules to public service broadcasting.

99. The Commission will apply this Communication to all notified aid measures in respect of

which it is called upon to take a decision after the Communication is published in the Official Journal, even where the projects were notified prior to that date.

100. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid [54], the Commission will apply, in the case of non-notified aid,

(a) this Communication, if the aid was granted after its publication;

(b) the 2001 Communication in all other cases.

[1] OJ C 320, 15.11.2001, p. 5.

[2] Judgment in Case C-280/2000 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark) (2003) ECR I-7747.

[3] Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

[4] Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

[5] COM(2007) 725 final.

[6] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007, p. 27.

[7] COM(2005) 107 final.

[8] For the purpose of the present communication, the notion "audiovisual service(s)" refers to the linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as online text-based information services. This notion of "audiovisual service(s)" must be distinguished from the narrower concept of "audiovisual media service(s)", as defined in Article 1(a) of the Audiovisual Media Services Directive.

[9] OJ C 364, 18.12.2000, p. 1.

[10] Judgment in Case C-260/89 ERT, (1991) ECR I-2925.

[11] For the purpose of the present communication, and in accordance with Article 16 of the EC Treaty and the declaration (No 13) annexed to the final act of Amsterdam, the term "public service" as of the Protocol on the system of public broadcasting in the Member States has to be intended as referring to the term "service of general economic interest" used in Article 86(2).

[12] Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 (OJ C 30, 5.2.1999, p. 1).

[13] Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, approved by Council Decision 2006/515/EC of 18 May 2006. In accordance with Annex 2 to of the Council Decision, "the Community is bound by the Convention and will ensure its implementation."

[14] Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 6(1) and (2)(h).

[15] Recommendation CM/Rec(2007)2 of the Committee of the Ministers to Member States on media pluralism and diversity of media content, adopted on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

[16] Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

[17] European Parliament Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, 2007/2253(INI).

[18] Cf. footnote 6 above.

[19] Commission Directive 2006/111/EC of 16 November 2006.

[20] Cf. footnote 4 above.

[21] Cf. footnote 3 above.

[22] According to Article 2(1)(a) of the Decision, it applies to State aid in the form of "public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million".

[23] Judgment in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 "TV2" at 156.

[24] Regarding the qualification of licence fee funding as State resources, see judgment in joined Cases T-09/04, T-317/04, T-329/04 and T-336/04 "TV2" at 158-159.

[25] Cases C-730/79, Philip Morris Holland v Commission (1980) ECR 2671, paragraph 11; C-303/88, Italy v Commission (1991) ECR I-1433, paragraph 27; C-156/98, Germany v Commission (2000) ECR I-6857, paragraph 33.

[26] Case C-280/2000, cf. footnote 2 above.

[27] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

[28] Case C-44/93, Namur-Les Assurances du Crédit SA v Office National du Ducroire and the Belgian State (1994) ECR I-3829.

[29] See, for example, the decisions of the Commission in the following cases: E 8/06, State funding for Flemish public service broadcaster VRT (OJ C 143, 10.6.2008, p. 7); E 4/05, State aid financing of RTE and TNAG (TG4) (OJ C 121, 17.5.2008, p. 5); E 9/05, Licence fee payments to RAI (OJ C 235, 23.9.2005, p. 3); E 10/2005, Licence fee payments to France 2 and 3 (OJ C 240, 30.9.2005, p. 20); E 8/05, Spanish national public service broadcaster RTVE (OJ C 239, 4.10.2006, p. 17); C 2/04, Ad hoc financing of Dutch public broadcasters (OJ L 49, 22.2.2008, p. 1); C 60/99 Commission Decision of 10 December 2003 on State aid implemented by France for France 2 and France 3 (OJ L 361, 8.12.2004, p. 21); C 62/99 Commission Decision of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ L 119, 23.4.2004, p. 1); NN 88/98, Financing of a 24-hour advertising-free news channel with licence fee by the BBC (OJ C 78, 18.3.2000, p. 6) and NN 70/98, State aid to public broadcasting channels Kinderkanal and Phoenix (OJ C 238, 21.8.1999, p. 3).

[30] Joined Cases T-195/01 and T-207/01, (2002) ECR II-2309.

[31] For example, Commission Decisions NN 88/98 BBC 24-hours (OJ C 78, 18.3.2000), NN 70/98 "Kinderkanal and Phoenix" (OJ C 238, 21.8.1999).

[32] For example, Commission Decision N 458/2004 State aid to Espacio Editorial Andaluza Holding sl., OJ C 131, 29.5.2005.

[33] NN 70/98, State aid to public broadcasting channels Kinderkanal and Phoenix (OJ C 238, 21.8.1999, p. 3).

[34] Judgment in the Case 172/80 Zuechner; (1981) 2021.

[35] Judgment in the Case C-242/95 GT-Link; (1997) 4449.

[36] Judgment in the Case C-159/94 EDF and GDF; (1997) I-5815.

[37] See, for example, the recent decisions of the Commission in the following cases: E 8/06, State funding for Flemish public service

broadcaster VRT (OJ C 143, 10.6.2008, p. 7); E 4/05, State aid financing of RTE and TNAG (TG4) (OJ C 121, 17.5.2008, p. 5); E 3/05, Aid to the German public service broadcasters (OJ C 185, 8.8.2007, p. 1); E 9/05, Licence fee payments to RAI (OJ C 235, 23.9.2005, p. 3); E 10/05, Licence fee payments to France 2 and 3 (OJ C 240, 30.9.2005, p. 20); State aid E8/05, Spanish national public service broadcaster RTVE (OJ C 239, 4.10.2006, p. 17); C 2/04, Ad hoc financing of Dutch public service broadcasters (OJ L 49, 22.2.2008, p. 1).

[38] Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.

[39] Judgment in the Case T-442/03, SIC v Commission, (2008), paragraph 201, Judgement in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2/Denmark v Commission (2008) at 122 to 124.

[40] These qualitative criteria are according to the Court of First Instance "the justification for the existence of broadcasting SGEIs in the national audiovisual sector". There is "no reason for a widely defined broadcasting SGEI which sacrifices compliance with those qualitative requirements in order to adopt the conduct of a commercial operator", T-442/03, SIC v Commission, paragraph 211.

[41] Regarding the qualification, under the Audiovisual Media Services Directive, of prize games including the dialling of a premium rate number as teleshopping or advertising, see the judgment of the Court in Case C-195/06 KommAustria v ORF of 18 October 2007.

[42] See judgment in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2 (2008) at 107-108.

[43] COM(1999) 657 final, Section 3(6).

[44] See judgment in the Case T-442/03 SIC/Commission (2008) at 212.

[45] Article 4 of Directive 2006/111/EC.

[46] This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated to non-public service activities.

[47] Of course, this provision does not preclude public service broadcasters from earning profits with their commercial activities outside the public service remit.

[48] Such special reserves may be justified for major technological investments (such as digitisation) which are foreseen to occur at a certain point in time and are necessary for the fulfilment of the public service remit; or for major restructuring measures necessary to maintain the continuous operation of a public service broadcaster within a well-defined time period.

[49] As the Council of Europe provided, in its Recommendation on the remit of public service media in the information society, "(...) Member States may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, Member States may consider allowing public service media to collect remunerations (...). However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society (...) When developing new funding systems, Member States should pay due attention to the nature of the content provided in the interest of the public and in the common interest."

[50] For example, the Commission considers that requiring direct payment from users for the provision of a specialised premium content offer would normally qualify as commercial activity. On the other hand, the Commission, for example, considers that the charging of pure transmission fees for broadcasting a balanced and varied programming over new platforms such as mobile devices would not transform the offer into a commercial activity.

[51] For example, the Commission considers that some forms of linear transmission, such as the simultaneous transmission of the evening TV news on other platforms (e.g. Internet, mobile devices), may be qualified as not being "new" for the purposes of this Communication. Whether other forms of retransmission of public broadcasters' programs on other platforms qualify as significant new services, should be determined by Member States, taking into account the specificities and the features of the services in question.

[52] See also at footnote 40 on the justification of a broadcasting SGEI.

[53] For example, one of the relevant issues may be to consider whether public service broadcasters are consistently overbidding for premium programme rights in a way which goes beyond the needs of the public service mandate and results in disproportionate distortions on the marketplace.

[54] OJ C 119, 22.5.2002, p. 22.

Articles

THE PROTECTION OF JOURNALISTIC SOURCES UNDER FIRE?

Dirk VOORHOOF, updated version July 2011.[1]

"The duty to give evidence is a normal civic duty in a democratic society. (..) That duty will suffice to justify an interference created by an obligation to testify on the ground that it is necessary for the maintenance of the authority and impartiality of the judiciary. (..) The Commission recalls that in a criminal trial, it is for the judge to consider the evidences before the court, and to assess its relevance and admissibility. The judge can only perform this function if he has powers to require the production of evidence before the court in the first place (..). The full picture should be before the criminal court" (European Commission of Human Rights 18 January 1996, BBC v. the United Kingdom, Appl. 25798/94, *Decisions & Reports,* 1994 - 84 A, 129)

"Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention, unless it is justifiable by an overriding requirement in the public interest" (European Court of Human Rights 27 March 1996, Goodwin v. the United Kingdom, § 39).

1. The protection of journalistic sources and the freedom of expression and information

One of the most fundamental rules of journalistic ethics, recognised in national and international codes, is that a journalist shall protect confidential sources of information. The obligation of journalists to maintain the confidentiality of their sources may come into conflict with the request of a litigant, a prosecutor, a judge, a court or any other investigative authority to ascertain the identity of a source for the purposes of proof, taking further action against the source or conducting further information. As a witness, journalists can be required to answer all relevant questions put to them and to provide the relevant documents in order to facilitate the due administration of justice. Consequently, the administration of justice is denied by a journalist refusing to identify a source and refusing to help to bring all the relevant information before the court.

Within the journalistic profession however it is considered as a "sacrosanct" obligation never to reveal the identity of a (confidential) source, even if the journalist risks to be prosecuted or convicted because of a refusal of a disclosure order.

The reasons behind this principle are obvious.

Journalists often receive leaked documents or information from sources who wish to remain anonymous, for instance because the information was intended to remain secret or confidential within a certain (private or public) organisation. Leaked information is an important source of journalistic input and it is only when journalists can guarantee the confidentiality and the anonymity of their sources that this crucial aspect of the news flow is protected. The idea is that journalists' sources are to be protected, otherwise sources of information may dry up. Journalists cultivate sources by promising them confidentiality.

As G. Robertson and A. Nicol point out in their handbook on media law:

"The cultivation of sources is thus professionally essential for journalists. It is a basic tool of their trade, the means by which newsworthy information is extracted, other than from those paid to give it a particular spin. Were it not for "unofficial sources" obligingly talking "off the record" to journalists, there would simply be much less news in the newspapers. There would be fewer facts and less information for discussion, for dispute and sometimes for retraction, in democratic society (..). If sources, frightened of exposure and reprisal, decide not to talk, there will not only be less news, but the news

[1] This paper was in a draft version presented at the conference organised by the Council of Europe "The media in a democratic society. Reconciling freedom of expression with the protection of human rights", Luxembourg 30 September - 1 October 2002, was published in *Auteurs & Media* 2003/1, 9-23 and was in a later version presented at the EFJ-conference on protection of journalistic sources, Prague, 23 May 2003. With thanks to Andrew Nicol, Martine Simonis, Anne Louise Schelin, Tyge Trier, Inger Høedt-Rasmussen, Michèle Bram, Tarlach Mc Gonagle and Marie Mc Gonagle for supplying information and/or giving feedback. Version 2005 at http://www.ifj-europe.org/docs/POS-Voorhoof2005.doc. This version is an adaptation of the article published in *Auteurs & Media* (Larcier) and has been actualized until 11 July 2011.

which is published, will be less reliable. It will not be checked for spin"[2].

As the input of information coming from persons who want to remain anonymous is extremely important for investigative journalists, and as this kind of journalism due to economic and commercial developments in the media sector by itself already has problems to develop, or even to survive, at least the legal protection of journalistic sources should be guaranteed. An ultimate goal and important perspective of the freedom of expression is the right of the public to be properly informed on matters of public interest. From this perspective proactive and investigative journalism is a crucial approach in order not to report only official sources or to rely solely on data and information the journalist has (passively) received on the news desk.

The crucial reason for not compelling journalists to reveal their sources of information or not compelling them to produce documents, files, pictures or film on demand of the police or the judiciary is that it would be a very negative evolution if the people in general, and (potential) sources specifically, would have the impression that the press and journalists can be easily incorporated in the work of police and the judiciary. It is important in other words to avoid, to prevent that the impression would grow that the press is a kind of an extension piece or an instrument of the institutionalised powers in society. The press and journalists should not be considered as virtual collaborators, neither as tools for police investigation, judicial prosecution or other law enforcement bodies.

This reasoning is not only developed by the journalistic sector itself, in ethical codes of journalistic practice, in media sociology or in journalism studies.

Within the Council of Europe the importance of the protection of journalistic sources is emphasized in the light of Article 10 of the European Convention on Human Rights. **Resolution No. 2 of the Prague Ministerial Conference on Mass Media Policy (1994)** refers to the protection of journalistic sources as a prerequisite for the freedom of expression and information in order to *"enable journalism to contribute to the maintenance and development of genuine democracy"*[3].

The protection of journalistic sources on the basis of Article 10 of the European Convention on Human Rights is recognised by the European Court of Human Rights in the case of **Goodwin versus the United Kingdom** (27 March 1996), a landmark judgment on the issue of protection of journalistic sources:

"Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected".

The Court also decided:

"Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention, unless it is justifiable by an overriding requirement in the public interest".

2. The protection of journalists' sources, the European Convention (Art. 10) and the case law of the European Court of Human Rights

The quotation of the European Court's judgment in *Goodwin v. the United Kingdom* makes clear that the protection of journalistic sources is not absolute. As this right is rooted in Article 10 of the European Convention, there might be reasons, responsibilities, duties that can restrict in one way or another the right of a journalist to keep his sources protected. An interference in the journalist's right to freedom of expression and information is not to be considered as a breach of Article 10 of the Convention if such interference is prescribed by law and is necessary in a democratic society for the legitimate aim pursued, such as the protection of the rights of other, the authority or the impartiality of the judiciary or the prevention of disorder or crime. Article 10 § 2 of the Convention shapes the framework for the

[2] G. ROBERTSON and A. NICOL, *Robertson & Nicol on media law,* London, Sweet & Maxwell, 4th Edition, 2002, 254-255. See also D. VOORHOOF, "Guaranteeing the freedom and independence of the media", in X. *Media and democracy*, Strasbourg, Council of Europe Publishing, 1998, 49 and D. VOORHOOF, "Vrijheid van meningsuiting", in J. VANDELANOTTE en Y. HAECK (eds.), *Handboek EVRM*, Antwerpen-Oxford, Intersentia, 2004, 837-1061. See also http://europe.ifj.org/en/pages/protection-of-sources.

[3] Resolution No. 2 *"Journalistic Freedoms and Human Rights"*, 4th European Ministerial Conference on Mass Media Policy, *The Media in a Democratic Society*, Prague, 7-8 December 1994, DH-MM (2000) 4, 39-42.

balancing of the freedom of expression as a fundamental human right in a democracy with *other* human rights and freedoms[4].

The European Court indeed has explicitly decided that an order of source disclosure is possible in certain circumstances, that is if interests are involved that are more imperative and more important than freedom of expression. According to the European Court it is however only when it is *"justifiable by an overriding requirement in the public interest"* that a disclosure order can be assumed to be in accordance with Article 10 § 2 of the Convention. It is also underlined by the Court that limitations on the confidentiality of journalistic sources *"call for the most careful scrutiny by the Court"*.

Goodwin v. the United Kingdom (violation Article 10)

In the Goodwin case the European Court came to the conclusion that the order compelling the journalist William Goodwin to reveal his sources was a breach of Article 10 of the Convention. The case concerned a young journalist in 1989 working for an economic magazine *The Engineer*. Goodwin was given information by a source about a commercial company, Tetra. This information was derived from an internal and strictly confidential corporate plan. The document indicated that the company was experiencing financial difficulties. After Goodwin contacted the company in order to check the facts and seek its comments on the information, the company started a procedure in order to find out who of its employees leaked the sensitive and confidential information. Goodwin was ordered by the judge to disclose his notes on the grounds that it was necessary in the interests of justice within the meaning of Section 10 of the Contempt of Court Act of 1981, for the source's identity to be disclosed in order to enable Tetra to bring proceedings against the source and to recover the document, obtain an injunction preventing further publication or seek damages for the expenses to which it had been put. The Court of Appeal finally gave order to Goodwin either to disclose his notes to Tetra or to deliver them to the Court in a sealed envelope with accompanying affidavit. This order was upheld by the House of Lords in 1990. Goodwin however did not comply with this order, which led to a judgment of the High Court who fined the applicant £ 5.000 for contempt of court[5].

In its judgment of 27 March 1996 the European Court concluded that both the order requiring Goodwin to reveal his source and the fine imposed on him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10 of the Convention. In the Court's view there was no reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve them. The restriction which the disclosure order entailed on Goodwin could not be regarded as having been necessary in a democratic society.

De Haes en Gijsels v. Belgium (violation Article 10)

The protection of journalistic sources may also be applicable in cases where the journalist is not a witness, but a person accused or held liable for defamatory statements. Such cases can be considered from the scope of Article 6 of the Convention (*right to a fair trial*). In its judgment in the case of *De Haes and Gijsels v. Belgium* the European Court of Human Rights applied the right of journalists not to disclose their source to a specific defamation case. An editor and a journalist had been convicted of defamation by the Brussels' civil Court of first instance, a judgment which was confirmed later by the Court of Appeal and the Supreme Court (Court of Cassation). De Haes and Gijsels were held liable for defamation in criticising some members of the judiciary. According to the Belgian courts, during the procedure the journalist and the editor did not sufficiently proof the truth of their allegations, as they had refused to prove the truth of the defaming information by disclosing their source. Their allegations however had been based on statements by court experts in other prior cases. For that reason De Haes and Gijsels had invited the Court of first instance and the Court of Appeal to order that these documents, already in the possession of other Belgian courts, would be submitted as evidence before the courts dealing with the defamation case in which the journalist and the editor were the defendants. The Belgian courts however were of the opinion that the request for production of documents demonstrated the lack

[4] The title of the COE-conference where this paper was presented (see footnote 1) would have been more correctly if it had been formulated as: "The media in a democratic society. Reconciling freedom of expression with the protection of **other** human rights".

[5] ECtHR 27 March 1996, Goodwin v. the United Kingdom.

of care with which De Haes and Gijsels had written their articles.

In its judgment of 24 February 1997 the European Court of Human Rights held that under Article 6 of the European Convention on Human Rights, national courts may not reject an application from an accused journalist to consider alternative evidence beside the disclosure of the source of information by this journalist, if such alternative evidence for the proof of the journalist's statements is available to the judiciary. The Court was of the opinion that the journalist's and the editor's concern not to risk compromising their sources of information by lodging the documents in question themselves, was legitimate. The outright rejection by the Belgian courts to study at least the opinion of the three experts whose reports had prompted De Haes and Gijsels to write their articles was considered as a breach of Article 6 of the Convention, as this rejection was to be regarded as a substantial disadvantage *vis-à-vis* the plaintiffs in the defamation case. There was therefore a breach of the principle of equality of arms. And hence a violation of Article 6 of the Convention, with reference to the protection of journalistic sources as protected by Article 10 of the Convention[6].

In other judgments the Court has reiterated that journalist have an obligation to rely on a sufficient solid, factual basis for the publication of critical remarks or defamatory allegations but that such an obligation does not imply that they have to reveal the identity of the persons who have provided them the information they have relied on[7].

Fressoz and Roire v. France (violation Article 10)

In the judgment in the case *Fressoz and Roire v. France* the Court was of the opinion that "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection", *in casu* in the light of the question if journalists were allowed to use, publish or refer to leaked, confidential documents falling under the protection of professional secrecy of others. The case concerned the conviction of Fressoz and Roire, the publishing director and a journalist of *Le Canard Enchaîné,* because of the publication of confidential tax files of the chief executive officer of Peugeot. According to the Court journalists however can invoke the protection of Article 10 of the Convention, as it falls to be decided whether "in particular circumstances of the case, the interest in the public's being informed outweighed the "duties and responsibilities" the applicants had as a result of the suspect origin of the documents that were sent to them". In the judgment of 21 January 1999 the Court reached the conclusion that the conviction of Fressoz and Roire because of the publication of confidential tax files violated Article 10 of the Convention[8]. The judgment gives additional protection to journalists using information or documents from confidential sources who themselves have breached a duty of confidentiality.

Roemen and Schmit v. Luxembourg (violation Article 10)

In the case of *Roemen and Schmit v. Luxembourg* the European Court of Human Rights again recognised the importance of the protection of journalistic sources. At the origin of this case lies an article in the *Lëtzëbuerger Journal* in which Robert Roemen reported that a Minister was convicted of tax evasion, commenting that such conduct was all the more shameful coming from a public person who should set an example. The article reported that the Minister had been ordered to pay a tax fine of LUF 100.000 (nearly EUR 2.500). This information was based on an internal document that was leaked from the Land Registry and Land Property Office. The Minister lodged a criminal complaint and an investigation was opened in order to identify the civil servant(s) who had handled the file under a breach of professional confidence. On instructions of the investigative judge searches were carried out at the journalist's home and place of work and at his lawyer's office. Both lodged several applications to set aside the investigating judge's instructions and the investigative measure undertaken on the strength of them, particularly the searches. All of these applications were dismissed by the Luxembourg domestic courts. Roemen and Schmit applied before the European Court in Strasbourg, alleging a breach of Article 6, 8 and 10 of the Convention. In its judgment of 25 February 2003 the Court came to the conclusion that the searching of the journalist's home and office was to be con-

6 ECtHR 24 February 1997, De Haes and Gijsels v. Belgium.
7 ECtHR (Grand Chamber) 17 December, Cumpănă and Mazăre,v. Romania (§ 106) and ECtHR 31 January 2006, Stângu and Scutelnicu v. Romania (§ 52).
8 ECtHR 21 January 1999, Fressoz and Roire v. France. See also ECtHR 19 December 2006, Radio Twist v. Slovakia and ECtHR 6 June 2007, Dupuis v. France.

sidered as a violation of Article 10 of the Convention[9]. Confirming its case law the Court considered that "having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention, unless it is justifiable by an overriding requirement in the public interest". The Court recognised that the searches carried out in the journalist's home and place of work were prescribed by law and pursued the legitimate aim of maintaining the public order and preventing crime. However, because the article had discussed a matter of general interest, the search interferences could not be compatible with Article 10 of the Convention unless they were justified by an "overriding requirement in the public interest". The Court was of the opinion that the Luxembourg authorities had not shown that the balance between the interests at stake had been preserved. The Court underlined that the search warrant gave the investigate officers very wide powers to burst in on a journalist at his place of work and gave them access to all the documents in his possession. The reasons adduced by the Luxembourg authorities could not be regarded as sufficient to justify the searches of the journalist's home and place of work. Therefore the Court comes to the conclusion that the investigative measures in issue had been disproportionate and had infringed Roemen's right to freedom of expression. The judgment also confirms the Court's case law that in principle the secrecy of communication between a lawyer and his or her client falls under the protection of privacy as guaranteed by Article 8 of the Convention. The Court considered that the search carried out by the Luxembourg judicial authorities at the lawyer's office and the seizure of a document had amounted to an unacceptable interference with her right to respect for her private life, and hence amounted to a violation of Article 8 of the Convention. The Court emphasized that the search carried out at the lawyer's office clearly amounted to a breach of the journalist's source through the intermediary of his lawyer. The Court held that the search had therefore been disproportionate to the legitimate aims pursued, particularly in view of the rapidity with which the search order had been carried out.

It is to be underlined that the Court clearly expressed the opinion that the searches carried out in the journalist's home and place of work and at his lawyer's office are even a greater treath to freedom of expression of journalists than a (court) order to reveal their sources. According to the Court a search is "un acte plus grave", as it gives access to all documents which a journalist has in his possession: "La Cour juge que des perquisitions ayant pour but de découvrir la source du journaliste - même si elles restent sans résultat - constituent un acte plus grave qu'une sommation de divulgation de l'identité de la source". The Court emphasises that the searches at Roemen's home and place of work "avaient un effet encore plus conséquent sur la protection des sources que dans l'affaire Goodwin".

Ernst and others v. Belgium (violation Article 10)

Also in the case of *Ernst and others v. Belgium* the Court found a violation of the rights of journalists to have their sources protected[10]. In 1995, searches took place in offices of Belgian media on the instructions of the investigative judge in charge of the case on the murder of André Cools, Minister of State and former head of the Socialist Party who was killed in Liège in 1991. The searches were carried out at the news desks of some newspapers (*Le Soir, Le Soir Illustré* and *De Morgen*), in the head office of the *RTBF*, the public broadcasting company of the French Community. Searches were also carried out in the homes of five journalists. Files, diskettes and hard disks of computers belonging to the journalists were taken for investigation. The background to these measures was that leaks in this and other very sensitive criminal cases had prompted proceedings against members of the judiciary on a charge of breach of professional confidence.

Some of the newspapers, four journalists, the society of professional journalists of *Le Soir* and the Belgian association of professional journalists (AGJPB/AVBB) applied before the European Court, alleging a violation of Article 6, 8, 10, 13[11] and 14[12] of the Convention. Relying on Article 10 of the Convention they asserted that the searches and the seizures carried out on their premises constituted an interference with the exercise of their freedom of expression. The applicants argued that *"les perquisitions massives et les saisies constitueraient une ingérence inqualifiable des autorités*

[9] ECtHR 25 February 2003, Robert Roemen and Anne-Marie Schmit v. Luxembourg.
[10] ECtHR 15 July 2003, Ernst and others v. Belgium
[11] Right to an effective remedy.
[12] Prohibition of discrimination.

belges dans l'exercice de la liberté d'expression. Cette ingérence ne saurait être considéré comme une restriction prévue par la loi, poursuivant un but légitime et nécessaire dans une société démocratique", and that *"les perquisitions et saisies qui ont eu lieu à leur domicile et dans certains rédactions sont constitutives d'une violation du secret des sources du journaliste"*.

In a decision of 25 June 2002 the Strasbourg Court declared the application of the news media and the journalists admissible. The Court was of the opinion that the case raised important questions of fact and law, which cannot be resolved at the stage of the admissibility but require an examination on the merits[13]. The application by *Le Soir Professional Journalists Society* and *the General Association of Professional Journalists in Belgium* however was dismissed as both organisations were not be considered as a "victim" in the sense of Article 34 of the Convention.

The European Court in its judgment of 15 July 2003 has come to the conclusion that the searches and seizures were neglecting the protection of journalistic sources protected by the right of freedom of expression and the right of privacy. The Court agreed that the interferences by the Belgian judicial authorities were prescribed by law and intended to prevent the disclosure of information received in confidence and to maintain the authority and impartiality of the judiciary. The Court considered that the searches and seizures which were intended to assemble information that could lead to the identification of police officers or members of the judiciary leaking confidential information came within the sphere of protection of journalistic sources, an issue which called for the most careful scrutiny by the Court. The Court emphasised the large scale of the searches that had been performed, while at no stage it had been alleged that the applicants had written articles containing secret information about the cases. The Court questioned also whether other means could not have been employed to identify those responsible for the breaches of confidence and especially took in consideration that the police officers involved in the operation of the searches had very wide investigative powers. The Court found that the Belgian authorities had not shown that the searches and seizures on such a large scale had been reasonably proportionate to the legitimate aims pursued and therefore came to the conclusion that there has been a violation of Article 10 of the Convention. The Court, for analogue reasons, also found a violation of the right of privacy protected under Article 8 of the Convention.

Nordisk Film & TV v. Denmark (no violation of Article 10)

In August 2002, by judgment of the Danish Supreme Court (*Højesteret*) Nordisk Film & TV, was compelled to hand over limited specified unedited footage and notes of a broadcasted television programme investigating paedophilia in Denmark. For making the programme, a journalist went undercover. He participated in meetings of "The Paedophile Association" and interviewed with hidden camera two members of the association who made incriminating statements regarding the realities of paedophilia in both Denmark and India, including advice on how to induce a child to chat over the internet and how easy it was to procure children in India. In the documentary broadcasted on national television false names were used and all persons' faces and voices were blurred. The day after the broadcast of the programme one of the interviewed persons, called "Mogens", was arrested and charged with sexual offences. For further investigation the Copenhagen Police requested that the un-shown portions of the recordings made by the journalist be disclosed. The journalist and the editor of the applicant company's documentary unit refused the request. Also the Copenhagen City Court and the High Court refused to grant the requested court order having regard to the need of the media to be able to protect their sources. The Supreme Court however found against the applicant company, so that the latter was compelled to hand over some parts of the unedited footage which solely related to "Mogens". The court order explicitly exempted the recordings and notes that would entail a risk of revealing the identity of some persons (a victim, a police officer and the mother of a hotel manager), who were interviewed while they were promised by the journalist that they could participate without the possibility of being identified. In November 2002 Nordisk Film & TV complained in Strasbourg that the Supreme Court's judgment breached its rights under Article 10 of the Convention, referring to the European Court's case law affording a high level of protection of journalistic sources.

[13] ECtHR 25 June 2002, Martine Ernst and others v. Belgium, Appl. No. 33400/96, *www.echr.coe.int.* See also M. Simonis, "Perquisitions: L'AGJBP à Strasbourg", *Journalistes,* 2002/28, 1-3 and -, "Strasbourg. L'action des journalistes est recevable", *Journalistes* 2002/29, 1-3.

In its decision of 8 December 2005 the Strasbourg Court has come to the conclusion that the judgment of the Danish Supreme Court did not violate Article 10 of the Convention. The Strasbourg Court is of the opinion that the applicant company was not ordered to disclose its journalistic sources of information, but that it was rather ordered to hand over part of its own-research material. The Court is not convinced that the degree of protection applied in this case can reach the same level as that afforded to journalists when it becomes to their right to keep their sources confidential under Article 10 of the Convention. The Court is also of the opinion that it is the state's duty to take measures designed to ensure that individuals within their jurisdiction are not subjected to inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment or sexual abuse of children of which the authorities had or ought to have knowledge. The European Court supports the opinion of the Danish Supreme Court that the non-edited recordings and the notes made by the journalist could assist the investigation and production of evidence in the case against "Mogens" and that it concerned the investigation of alleged serious criminal offences. Of particular importance is that the Supreme Court's judgment explicitly guaranteed that material which entailed the risk of revealing the identity of the journalist's sources was exempted from the court order and that the order only concerned the handover of a limited part of the unedited footage as opposed to more drastic measures such as for example a search of the journalist's home and workplace. In these circumstances the Strasbourg Court is satisfied that the order was not disproportionate to the legitimate aim pursued and that the reasons given by the Danish Supreme Court in justification of those measures were relevant and sufficient. Hence Article 10 of the Convention has not been violated. The application is manifestly ill-founded and is declared inadmissible.

The decision of the European Court makes clear that the Danish Supreme Court's order to compel the applicant to hand over the unedited footage is to be considered as an interference in the applicant's freedom of expression within the meaning of Article 10 § 1 of the Convention. *In casu* the interference however meets all the conditions of Article 10 § 2, including the justification as being "necessary in a democratic society". The Strasbourg Court is also of the opinion that the Supreme Court and the Danish legislation (Art. 172 and 804-805 of the Administration of Justice Act) clearly acknowledge that an interference with the protection of journalistic sources cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest, hence reflecting the approach developed in the Strasbourg Court's jurisprudence in the case of *Goodwin v. the United Kingdom* (1996), *Roemen and Schmit v. Luxembourg* (2003) and *Ernst and others v. Belgium* (2003)[14].

Voskuil v. the Netherlands (violation of Article 10)

This case concerns the complaint of a journalist, Mr. Voskuil, having been denied the right not to disclose the source he had relied on for writing two articles in the newspaper *Sp!ts*. As he had refused to reveal his source to the authorities, Voskuil was detained for more than two weeks, in an attempt to compel him to reveal the identity of his source.

In essence the Court was struck by the lengths to which the Netherlands authorities had been prepared to go to learn the source's identity. Such far-reaching measures could but discourage those who had true and accurate information relating to wrongdoing from coming forward in the future and sharing their knowledge with the press. The Court found that the Government's interest in knowing the identity of the journalist's source had not been sufficient to override the journalist's interest in concealing it. There had therefore been a violation of Article 10[15].

[14] Decision as to the admissibility by the European Court of Human Rights (First Section), case of Nordisk Film & TV A/S v. Denmark, Application no. 40485/02 of 8 December 2005, available at http://www.echr.coe.int (Hudoc), see also D. VOORHOOF, "Rechter kan niet-uitgezonden televisiebeelden van interview met pedofiel opeisen", *Mediaforum* 2006/3, 65-67. See also European Commission of Human Rights 18 January 1996, *BBC v. the United Kingdom*, Appl. 25798/94, *Decisions & Reports*, 1994-84, 129. Also in the case *of Še?i? v. Croatia* (31 May 2007), the Court took into consideration that in some circumstances an action of the police or the Public Prosecutor's Office in requesting a competent court to order a journalist to reveal his source of information would not a priori be incompatible with Article 10 of the Convention. The case concerned an investigation related to ill-treatment of Roma in the meaning of Article 3 of the Convention.

[15] ECtHR 22 November 2007, Voskuil v. the Netherlands.

Tillack v. Belgium (violation of Article 10)

In another case the journalist H.M. Tillack applied for a violation by the Belgian authorities of this right of protection of sources. Tillack has been suspected of having bribed a civil servant by paying him EUR 8,000 in exchange for confidential information concerning investigations in progress in the European institutions. Tillack's home and workplace were searched and almost all his working papers and tools were seized and placed under seal (16 crates of papers, two boxes of files, two computers, four mobile phones and a metal cabinet). The European Court emphasized that a journalist's right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information, to be treated with the utmost caution, even more so in the applicant's case, where he had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that he had not been charged. The Court also took into account the amount of property seized and considered that although the reasons given by the Belgian courts were "relevant", they could not be considered "sufficient" to justify the impugned searches. The European Court accordingly found that there had been a violation of Article 10 of the Convention[16].

Financial Times Ltd. v. the United Kingdom (violation of Article 10)

In 2002 British courts decided in favour of a disclosure order in the case of *Interbrew SA* v. *Financial Times* and others. The case concerns the order against four newspapers (FT, The Times, The Guardian and The Independent) and the news agency Reuters to deliver up their original copies of a leaked and (apparently) partially forged document about a contemplated takeover by Interbrew (now: Anheuser Busch InBev NV) of SAB (South African Breweries). In a judgment of 15 December 2009 the European Court of Human Rights (Fourth Section) has come to the conclusion that this disclosure order was a violation of the right of freedom of expression and information, which includes press freedom and the right of protection of journalistic sources as protected by Article 10 of the European Convention of Human Rights.

The European Court of Human Rights has come to the conclusion that the British judicial authorities in the Interbrew case have neglected the interests related to the protection of journalistic sources, by overemphasizing the interests and arguments in favour of source disclosure. The Court accepts that the disclosure order in the Interbrew case was prescribed by law (*Norwich Pharmacal* and Section 10 of the *Contempt of Court Act* 1981) and was intended to protect the rights of others and to prevent the disclosure of information received in confidence, both of which are legitimate aims. The Court however does not consider the disclosure order necessary in a democratic society. Disclosure orders of journalistic sources have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves. The Courts accepts that it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information. The Court makes clear however that domestic courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. The Court emphasizes most importantly that "*the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2*" (§ 63).

The European Court of Human Rights comes to the conclusion that the British Courts have given too much weight to the alleged bogus character of the leaked document and to the assumption that the source had acted *mala fide*. While the Court considers that there may be circumstances in which the source's harmful purpose would in itself constitute a relevant and sufficient reason to make a disclosure order, the legal proceedings against the four newspapers and Reuters did not allow X's purpose to be ascertained with the necessary degree of certainty. The Court therefore

[16] ECtHR 27 November 2007, Tillack v. Belgium.

does not place significant weight on X's alleged purpose in the present case, but does clearly emphasize the public interest in the protection of journalistic sources. The Court accordingly, finds that Interbrew's interests in eliminating, by proceedings against X, the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest in the protection of journalists' sources. The judicial order to deliver up the report at issue is considered a violation of Article 10 of the Convention[17].

Sanoma Uitgevers BV v. the Netherlands (violation of Article 10)

On 31 March 2009 the Chamber of the Third Section of the European Court of Human Rights (ECtHR) delivered a highly controversial judgment in the case of *Sanoma Uitgevers B.V. v. the Netherlands*. With a 4/3 decision the Court was of the opinion that the order to hand over a CD-ROM with photographs in the possession of the editor-in-chief of a weekly magazine claiming protection of journalistic sources, did not amount to a violation of Article 10 of the European Convention of Human Rights. The finding and motivation of the majority of the Chamber was not only strongly disapproved in the world of media and journalism, but was also firmly criticised by the dissenting judges. *Sanoma Uitgevers B.V.* requested for a referral to the Grand Chamber, this request being supported by a large number of media, NGOs advocating media freedom and professional organisations of journalists. On 14 September 2009 the panel of five Judges decided to refer the case to the Grand Chamber in application of Article 43 of the Convention. By referring the case to the Grand Chamber the panel accepted that the case raised a serious question affecting the interpretation or application of Article 10 of the Convention and/or concerned a serious issue of general importance.

On 14 September 2010, the 17 judges of the Grand Chamber unanimously reached the conclusion that the order to hand over the CD-ROM to the public prosecutor was a violation of the journalists' rights to protect their sources. It noted that orders to disclose sources potentially had a detrimental impact, not only on the source, whose identity might be revealed, but also on the newspaper or publication against which the order was directed, whose reputation might be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who had an interest in receiving information imparted through anonymous sources. Protection of journalists' sources is indeed to be considered "a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected". In essence the Grand Chamber is of the opinion that the right to protect journalistic sources should be safeguarded by sufficient procedural guarantees, including the guarantee of prior review by a judge or an independent and impartial decision-making body, before the police or the public prosecutor have access to information capable of revealing such sources. Although the public prosecutor, like any public official, is bound by requirements of basic integrity, in terms of procedure he or she is a "party" defending interests potentially incompatible with journalistic source protection and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests. As in the case of *Sanoma Uitgevers B.V. v. the Netherlands* an *ex ante* guarantee of a review by a judge or independent and impartial body was not existing, the Grand Chamber is of the opinion that "the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources". Emphasizing the importance of the protection of journalistic sources for press freedom in a democratic society the Grand Chamber of the European Court finds a violation of Article 10 of the Convention. The judgment implies that member states of the Convention shall build in procedural safeguards in their national law in terms of a judicial review or other impartial assessment by an independent body based on clear criteria of subsidiarity and proportionality and prior to any disclosure of in-

[17] ECtHR 15 December 2009, Financial Times Ltd. a.o. v. the United Kingdom. The Court has also recognized the right of whistle blowers, under certain circumstances, to be guaranteed by Article 10 of the Convention: ECtHR (Grand Chamber) 12 February 2008, Guja v. Moldova.

formation capable of revealing the identity or the origin of journalists' sources[18].

3. Recommendation (2000) 7 "on the right of journalists not to disclose their sources of information"

The references just mentioned make clear that in the countries referred to (Luxembourg, Belgium, The Netherlands, the United Kingdom, Denmark) the level and the characteristics of the protection of journalistic sources are or were rather uncertain and unclear and are subject to very different approaches by the police, the public prosecutors and the courts. Over the years also in many other countries of the Council of Europe cases have been reported of actions by police or judicial authorities not sufficiently respecting the protection of journalistic sources as guaranteed by Article 10 of the European Convention, in line with the Court's case law since 1996. It is also to be underlined that the Strasbourg Court left open a margin of appreciation by introducing the notion of *"an overriding requirement in the public interest"* that can legitimise a disclosure order.

In order to work out some more practical guidelines and to guarantee an effective protection of journalistic sources in the member states, the Committee of Ministers of the Council of Europe adopted Recommendation (2000) 7 *"on the right of journalists not to disclose their sources of information"* (8 March 2000) [19].

Principle 1 of the Recommendation stipulates that *"domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention (..) and the principles established herein, which are to be considered as minimum standards for the respect of this right"*. The right of journalists not to disclose their sources is to be recognised and organised for *"any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of communication"*.

Principle 2 of the Recommendation broadens the scope of application of the protection of sources to all persons *"who, by their professional relations with journalist, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information"*.

According to the Recommendation the protection of journalistic sources should have a broad field of application: *"Journalists may receive their information from all kinds of sources. Therefore, a wide interpretation of this term is necessary. The actual provision of information to journalists can constitute an action on the side of the source, for example when a source calls or writes to a journalist or sends to him or her recorded information or pictures. Information shall also be regarded as being "provided" when a source remains passive and consents to the journalist taking the information, such as the filming or recording of information with the consent of the source"*.

The notion of *"information identifying a source"* must be broadly interpreted, because it is necessary to protect all kinds of information which are likely to lead to the identification of a source. As far as its disclosure may lead to an identification of a source, the following information is to be protected according to the Recommendation:

i. the name of a source and his or her address, telephone and telefax number, employer's name and other personal data as well as the voice of the source and pictures showing a source;

ii. "the factual circumstances of acquiring this information", for example the time and place of a meeting with a source, the means of correspondence used or the particularities agreed between a source and a journalist;

iii. "the unpublished content of the information provided by a source to a journalist", for example other facts, data, sounds or pictures which may indicate a source's identity and which have not yet been published by the journalist;

iv. personal data of journalists and their employers related to their professional work", i.e. personal data produced by the work of journalists, which could be found, for example, in address lists, lists of telephone calls, registrations of computer-based communications, travel arrangements or bank statements[20].

The nature of the information is not relevant and can include oral or written statements, sounds or pictures.

[18] ECtHR (Grand Chamber) 14 September 2010, Sanoma Uitgevers BV v. the Netherlands.
[19] Committee of Ministers, Recommendation (2000) 7 *on the right of journalists not to disclose their sources of information*, 8 March 2000, DH-MM (2000) 2, 125-128 (Explanatory Memorandum). See also w*ww.humanrights.coe.int/media/*
[20] See also the Explanatory Memorandum to Recommendation (2000)7.

According to ***principle 3*** of the Recommendation a compelling order to reveal a source is only legitimate when it can be convincingly established that: *i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that: - an overriding requirement of the need for disclosure is proved, - the circumstances are of a sufficiently vital and serious nature, - the necessity of the disclosure is identified as responding to a pressing social need, and, - member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights*.

The first condition refers to the **subsidiarity** principle: the persons or public authorities seeking a disclosure should primarily search for and apply proportionate alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the protection of the right of journalists not to disclose their source. The existence of reasonable alternative measures for the protection of a legitimate interest excludes the necessity of disclosing the source by the journalist and the parties seeking the disclosure have to exhaust these alternatives at first.

The second condition refers to the **proportionality** principle. The public interest in the non-disclosure could, according to the Explanatory Memorandum be outweighed where the disclosure is necessary for "the protection of human life" and "the prevention of major crime". In the latter category are typically activities which may contribute to or result in such crimes as murder, manslaughter, severe bodily injury, crimes against national security, or serious organised crime. The prevention of such crimes can *possibly* justify the disclosure of a journalist's source.

It is also recognised that a disclosure order can be legitimate for "the defence in the course of legal proceedings of a person who is accused or convicted of having committed a serious crime". In the Explanatory Memorandum it is explicitly mentioned that the right of defence of a person, who is accused or convicted of having committed a major crime may *possibly* justify the disclosure of a journalist's source.

The disclosure order must also be "prescribed by law" and it must be pertinently argued in every case why the disclosure order *in casu* is necessary in a democratic society, with a clear motivation why the conditions of subsidiarity and proportionality are fulfilled. Only where and as far as an overriding requirement in the public interest exists and if the circumstances are of a sufficiently vital and serious nature, a disclosure might be considered necessary in a democratic society in accordance with Article 10 § 2 of the European Convention on Human Rights. Principle 3 of the Recommendation stipulates the requirements for the evaluation of such necessity.

Principle 4 of the Recommendation stipulates, in line with the judgment in the case De Haes and Gijsels v. Belgium, that in legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist. If in a defamation case alternative evidence for the proof of the journalist's statements is available to the judiciary, respect should be demonstrated towards the protection of journalistic sources.

Principle 5 refers to some procedural conditions which must be fulfilled for initiating any action against a journalist aimed at the disclosure of sources. One of the recommendations is that journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before disclosure is requested (cfr. principle 3). Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the European Convention ("fair trial").

Principle 6 provides that the following measures should not be applied if their purpose is to circumvent the right of journalists not to disclose information identifying a source:

i. interception orders or actions concerning communication or correspondence of journalists or their employers,

ii. surveillance orders or actions concerning journalists, their contacts or their employers, or

iii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers

or personal data related to their professional work.

The Explanatory Memorandum of Recommendation (2000) 7 considers that *"journalist's private or business premises, belongings or correspondence or personal data related to their work may contain information which could lead to the disclosure of a source. The same situation exists with respect to the business premises, belongings, archives or personal data of the journalist's employer. Any search or seizure action might reveal information identifying a source."* Judicial authorities ordering such search or seizure therefore should limit their search and seizure order with respect to the protection of a journalist's source.

Principle 7 finally refers to the protection against self-incrimination.

It is to be underlined that the circumstance that information was gathered in an illegal way or that the source disclosed the information to the journalist in breach of his or her own obligation of professional confidentiality, may not deprive a journalist of his right of protection of sources. Action is to be undertaken to make that these basic principles of the Recommendation (2000) 7 are better implemented in the law and the jurisprudence of the Council of Europe Member States. The Committee of Ministers recommended the member states to *"implement in their domestic law and practice the principles appended to this recommendation"* and *"to disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and to bring them in particular to the attention of public authorities, police authorities and the judiciary as well as to make them available to journalists, the media and their professional organisations"*.

4. The PACE-Recommendation Rec. 1950 (2011) on the protection of journalists' sources[21].

In a Recommendation of 25 January 2011 the Parliamentary Assembly of the Council of Europe again has insisted that the member states should take appropriate and effective measures in order to protect the right of journalists not to reveal the identity or origin of their sources: "The Assembly notes with concern the large number of cases in which public authorities in Europe have forced, or attempted to force, journalists to disclose their sources, despite the clear standards set by the European Court of Human Rights and the Committee of Ministers. These violations are more frequent in member states without clear legislation. In cases of investigative journalism, the protection of sources is of even greater importance, as stated in the Committee of Ministers' Declaration of 26 September 2007 on the protection and promotion of investigative journalism". The Assembly also refers to the right of every person to disclose confidentially to the media, or by other means, information about unlawful acts and other wrongdoings of public concern, recalling its Resolution 1729 (2010) and Recommendation 1916 (2010) on the protection of "whistleblowers". It reaffirms that member states should review legislation in this respect to ensure consistency of domestic rules with the European standards enshrined in these texts. It is also emphasized that "Internet service providers and telecommunication companies should not be obliged to disclose information which may lead to the identification of journalists' sources in violation of Article 10 of the Convention". The Assembly furthermore insists on the need to ensure that legal provisions enacted by member states when transposing the Union's Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications are consistent with the right of journalists not to disclose their sources under Article 10 of the Convention and with the right to privacy under Article 8 of the Convention.

In sum, the Assembly recommends that the Committee of Ministers:

"17.1. call on those member states which do not have legislation specifying the right of journalists not to disclose their sources of information, to pass such legislation in accordance with the case law of the European Court of Human Rights and

[21] http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta11/erec1950.htm. In contrast with the 2000/7 Recommendation of the Committee of Ministers the Assembly under section 15 of the Recommendation 1950 (2011) suggested to reduce the right of protection of journalists' sources *'ratione personae'*. It is also remarkable, and in contrast with the case of the European Court, that the Recommendation refers to this right as *'a privilege'*. The Assembly indeed considers that "the right of journalists not to disclose their sources of information is a professional privilege, intended to encourage sources to provide journalists with important information which they would not give without a commitment to confidentiality. The same relationship of trust does not exist with regard to non-journalists, such as individuals with their own website or web blog. Therefore, non-journalists cannot benefit from the right of journalists not to reveal their sources".

Committee of Ministers Recommendation No. R (2000) 7;

17.2. assist member states in analysing and improving their legislation on the protection of the confidentiality of journalists' sources, in particular by supporting the review of their national laws on surveillance, anti-terrorism, data retention and access to telecommunications records;

17.3. ask its competent steering committee to draw up, in co-operation with journalists' and media freedom organisations, guidelines for prosecutors and the police, as well as training material for judges, on the right of journalists not to disclose their sources of information, in accordance with Committee of Ministers Recommendations Nos. R (2000) 7 and Rec(2003)13 and the case law of the European Court of Human Rights;

17.4. ask its competent steering committee to draw up guidelines for public authorities and private service providers concerning the protection of the confidentiality of journalists' sources in the context of the interception or disclosure of computer data and traffic data of computer networks in accordance with Articles 16 and 17 of the Convention on Cybercrime and Articles 8 and 10 of the European Convention on Human Rights".

In some countries Recommendation (2000)7 of the Council of Europe has been an incentive to start to develop at national level the protection of journalistic sources. In ***the Netherlands*** a circular letter ("Aanwijzing") of the college of attorneys-general contains the crucial guidelines for the police and the public prosecutor's office in order to respect the protection of journalistic sources[22]. Although these guidelines had no status of formal law, they were intended to reflect a clear option to protect journalistic sources in a confrontation with the police and the public prosecutor[23]. The Grand Chamber judgment of 14 September 2010 in the case of *Sanoma Uitgevers B.V. v. the Netherlands* has made clear however that these guidelines did not guarantee sufficient protection for the protection of journalistic sources in the Netherlands. A law proposal and a modification of the guidelines has been announced in 2011.

Since 2010 in **France** the law on protection of journalistic sources had been modified substantially in order to meet the standards of the European Human Rights system (Law of 4 January 2010), although the new law is still considered insufficiently protective for the journalists' sources[24].

Both in Luxembourg and Belgium steps have been taken earlier to implement the European Court's case law and the principles of the Recommendation of the Council of Europe on the protection of journalistic sources, especially after the judgments of 2003 in the cases Roemen and Schmit v. Luxembourg and Ernst and others v. Belgium (cfr. supra).

In ***Luxembourg*** the Law of 8 June 2004 ("Law on the freedom of expression in the media") explicitly recognises the protection of sources of journalists. The Articles 7 and 8 of the Law, under section "De la protection des sources" guarantee this right in line with the Recommendation (2000)7 of the Council of Europe.

In ***Belgium,*** a law proposal on the protection of journalistic sources has been introduced before parliament in October 2002, referring also to Recommendation (2002)7 of the Council of Europe. On 15 May 2003 the Minister of Justice published a circular letter ("Omzendbrief/circulaire") on the protection of sources. This circular letter, aimed to inform the public prosecutors, however only contained a short summary of the relevant case law of the European Court of Human Rights on the issue, without taking any further steps to develop the principles contained in this jurisprudence. In spring 2005 the Belgian Parliament finally approved the law on the protection of journalistic sources.

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[22] Openbaar Ministerie, Aanwijzing toepassing dwangmiddelen bij journalisten, *Stcrt.* 2002, 46 (Policy guidelines), *www.openbaarministerie.nl/beleidsregels/docs/2002a003.htm.* For a critical analysis, see C. BRANTS, "Grenzen van de journalistiek: vrije nieuwsgaring en de aanwijzing toepassing dwangmiddelen bij journalisten", *N.J.C.M.-Bulletin* 2002/7, 864-881.

[23] C. BRANTS, "Grenzen van de journalistiek: vrije nieuwsgaring en de aanwijzing toepassing dwangmiddelen bij journalisten", *l.c.,* 880. See also T. PRAKKEN, "Justitiële versus journalistieke waarheidsvinding", *NJB* 2004/12, 620-626.

[24] See
www.lemonde.fr/societe/video/2010/09/13/il-y-a-une-loi-sur-la-protection-des-sources-il-faut-la-respecter_1410689_3224.html;
www.slate.fr/story/27665/journalistes-protection-sources-affaires and http://europe.ifj.org/en/articles/efj-condemns-actions-by-french-government-against-journalists-rights.

5. The protection of journalists' sources and the Luxembourg Media Law of 8 June 2004

In 2004 Luxembourg has taken an important initiative in order to integrate the principles of the European Court's case law and of the Recommendation (2000) 7 into the law on freedom of expression in the media (Media Law)[25].

The Media Law of 8 June 2004 in its Article 7 guarantees that journalists heard as a witness by an administrative or judicial authority in the course of administrative or judicial proceedings shall be entitled to refuse to disclose information identifying a source, or the content of information that he has obtained or collected.

The positive evaluation made by P. Wachsmann in his report *"Analyse écrite du project de loi Luxembourgeois sur la liberté d'expression dans les médias"* is pertinent, especially with regard to the broad scope of application of Article 7 of the Luxembourg media law, an approach that is coherently in line with the Recommendation of the Council of Europe[26]. The Media Law not only protects journalists: also publishers and anyone who in course of their professional relations with a journalist have obtained knowledge of information identifying a source, can invoke the right to refuse disclosure of information.

The possibility of circumventing measures by the police or judicial authorities, such as searches, seizures and telephone tapping, in order to unmask the identity of a journalist's sources, is also explicitly restricted (Article 7, 3°). Judicial action and police authorities must refrain from ordering action or taking measures with the intention *or effect* (!) of circumventing this right. The Law explicitly refers to searches or seizures at the home or work place of journalists or the persons who are in a professional relation with them. Additionaly Article 7, 4° of the Media Law considers as illegal evidence any information identifying a source, if this information is obtained by way of a legal judicial search or seizure which was not aimed at the disclosing the identity of a source.

The balance in respecting other human rights and the functioning of the judiciary is to be found in Article 8 of the media law, which stipulates that where the action of the administrative, judicial or police authorities concerns the prevention, prosecution or punishment of serious crimes against the person, drug-trafficking, money-laundering, terrorism or offences against the security of the State, journalists may not invoke the right of the protection of sources as it mentioned in Article 7. Article 8 clarifies to some extend what is meant by the European Court as *"an overriding requirement in the public interest"*. This provision enumerates in other words the cases in which the protection of other interests prevails over the interest of not disclosing sources. The reference to serious crimes and some other offences refer to situations that are generally considered to be sufficiently serious to justify a restriction on the protection of sources. In these cases, the pre-eminence of a public interest to suppress and punish one of the behaviours covered is presumed and justifies exemption from the principle of protection of sources. The approach or Article 8 of the Luxembourg media law however is not fully in line with the European Court's case law and Recommendation (2000) 7. As Article 8 is formulated, it might open the door for a too wide application of disclosure orders, as both the aspect of subsidiarity and proportionality are not incorporated in this provision. It should indeed not be sufficient as such if an investigation deals with serious crimes against the person or some other offences. As Wachsman observed correctly in his written analysis of the Luxembourg draft law *"la définition des cas dans lesquels est supprimé le bénéfice du droit de refuser la divulgation des informations identifiant une source et le contenu des informations obtenues ou collectées apparaît trop extensive, en contradiction avec ce que préconise la recommendation du Comité des Ministres et avec ce que suggère l'exposé des motifs lui-même"*. The way Article 8 is formulated, a journalist may not invoke his right of protection of sources from the moment an action, investigation or court case concerns a serious crime or an explicitly mentioned offence. It is obvious that this provision not only omitted to refer to the subsidiarity principle (*"it must be convincingly established that reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure"*). It is also necessary to incorporate as a basic condition in Article 8 that any disclosure order must pertinently motivate why the legitimate interest in the disclosure clear-

[25] Article 7 and 8 of the Luxembourg Law of 8 June 2004 on the Freedom of Expression in the Media (Loi sur la liberté d'expression dans les medias, Memorial A- nr. 85, 1201.See also *Chambre des Députes* 2001-2002, n° 4910, Projet de loi sur la liberté d'expression dans les médias.

[26] P. WACHSMANN, *"Analyse écrite du project de loi Luxembourgeois sur la liberté d'expression dans les médias"*, Council of Europe, Strasbourg, ATCM (2002)8, 16 p. Also available at *www.humanrights.coe.int/media.*

ly outweighs the public interest in the non-disclosure. Only by formulating it that way the public authorities are invited and obliged to motivate consistently why an overriding requirement of the need for disclosure is proved, that the circumstances are of a sufficiently vital and serious nature and that the necessity of the disclosure is identified as responding to a pressing social need. To some degree however Article 2 of the Media Law can help to reinstall the balance, as this Article provides that any restriction or interference in the freedom of expression as protected by Article 10 of the European Convention must be proportionate to the legitimate aim pursued ("toute restriction ou ingérence (..) doit répondre à un besion social impérieux et être proportionnée au but poursuivi").

A last remark with regard to the Luxembourg Media Law refers to the unclear situation whether a journalist can lose the protection of his sources as guaranteed by the law, if he has obtained information from a source that breached his or her obligation of secrecy of confidentiality[27]. In the Explanatory Memorandum of the draft media law it is said: *"Protection of sources is therefore required in the name of freedom of expression. It is important to stress that its purpose is not to guarantee the impunity of the journalist or the source. (..) Only a journalist who lawfully and legally has information may invoke it. The judicial authorities maintain the power to avail themselves of every means at their disposal to reveal the identity of a source"*. The Explanatory Memorandum underlines also that *"it should be noted that if a journalist lawfully possesses information, he or she must be able to use it lawfully, even where the information is the product of an offence committed by the source. The journalist may not in this case be found guilty since he or she has not him- or her self-committed the offence"*. It is mentioned in the Explanatory Memorandum that the journalist *"may not use this privilege where he or she is implicated as the author, co-author or accomplice of an offence"*. The consequences of these different circumstances are not very clearly elaborated in the Luxembourg Media Law. The law left open some possibilities to circumvent the protection of journalistic sources. This holds the risks that journalistic sources in the future will not be protected on a sufficient level.

6. Belgium: law on the protection of journalists' sources (7 April 2005)

In Belgium the discussion about the (lack of) protection of journalists' sources has often been on, – and mostly after short time again off –, the political agenda[28]. Several law proposals have been introduced in Belgian Parliament since 1984[29], but never a political majority was found to support one of these law proposals. New initiatives to elaborate a legal framework for the protection of journalistic sources were taken in 2002[30].

Since the judgment in the case of *Ernst and others v. Belgium* (15 July 2003), in which the European Court of Human Rights condemned Belgium for unnecessary and disproportionate interferences by the judicial authorities which failed to respect the confidentiality of journalistic sources, journalists and their professional organisations have called for a legal framework to protect journalistic sources. The request for such a legal framework was put on the agenda again after the

[27] See the references to the recent case law in Belgium, the United Kingdom and France.

[28] For an overiew see D. VOORHOOF, Recht op informatie, garingsvrijheid en een zwijgrecht voor de journalistiek, Gent, Liga voor Mensenrechten, 1985; B. DEJEMEPPE, "Protection des sources ou secret professionel. D'un faux problème à une vraie responsabilité", Journ. Proc, 1991/196, 33-35; M. BUYDENS, "Droits et obligations du professionel de l'information à l'égard de ses 'sources'", Journ. Proc. 1993/247, 10; J. VELU, Beschouwingen over de europese regelgeving inzake betrekkingen tussen gerecht en pers, R.W. 1995-1996, 273-308 (300-301); H. BOSLY, D. D'HOOGHE en D. VOORHOOF, Justitie & Media, Drie pre-adviezen op vraag van de Minister van Justitie, Brussel, 1995, C/45-47; J. CEULEERS, "Een zwijgrecht voor journalisten? bis", R.W. 1996-1997, 975-977; P. TOUSSAINT, "Le secret des sources du journaliste", Rev.Trim.Dr.Homme 1996, 452-457; A. BORMS, "Het arrest Goodwin: een mijlpaal in de mediajurisprudentie omtrent het bronnengeheim", ICM Jaarboek Mensenrechten 1995-1996, 292-299 en D. VOORHOOF, "Het journalistiek bronnengeheim voortaan niet enkel een deontologisch principe, maar ook een afdwingbaar recht", AM 1996/3, 355-360 and D. VOORHOOF, "Naar een wettelijke erkenning van het journalistiek bronnengeheim?", in A. HENDRIKS, J. HUYPENS en J. SERVAES (eds.), Media en Politiek. Liber Memorialis Luk BOONE, Leuven, Acco, 1998, 105-113.

[29] *Parl. St.* Kamer 1984-1985, nr. 1032/1; *Parl. St.* Kamer 1984-1985, nr. 1170/1; *Parl. St.* Kamer 1984-1985, nr. 1196/1; *Parl. St.* Kamer 1985-1986, nr. 261/1-2; *Parl. St.* Kamer 1986-1987, nr. 786/1-2; *Parl. St.* Kamer, 1986-1987, nr. 800/1; *Parl. St.* Senaat B.Z. 1998, nr. 94/1; *Parl. St.* Kamer B.Z. 1988, nr. 336/1; *Parl. St.* Kamer 1992-1993, nr. 1015/1 and *Parl. St.* Kamer 1995-1996, nr. 137/1.

[30] Wetsvoorstel tot bescherming van de informatiebronnen van de journalist/Proposition de loi relative à la protection des sources d'information du journaliste, *Parl. St.* Kamer 2002-2003, nr. 2102/001 (G. Bourgeois, 28 October 2002) and *Parl. St.* Kamer BZ 2003, nr. 24/001 (G. Bourgeois, 25 June 2003). See also the law proposal "visant à accorder aux journalistes le droit au secret de leurs sources d'information", *Parl. St.* Kamer BZ 2003, nr. 111/001 (O. Maingain and M. Payfa).

searches at the office and in the home of *Stern*-journalist Hans Martin Tillack in 2004. In a judgment of 1 December 2004, the Belgian Supreme Court (*Hof van Cassatie / Court de Cassation*) was of the opinion that as part of a legitimate investigation into bribery of a civil servant of the EU, the searches at H.M. Tillack's home and in the Brussels' office of *Stern* were not to be considered as illegal, nor violated Article 10 of the European Convention[31]. However, on 27 November 2007 the European Court of Human Rights found a violation of Article 10 by the Belgian authorities. A strong call for the protection of journalistic sources was also made on 26 January 2005 at a press conference organised by the newspaper *De Morgen*, after it was revealed that a judicial investigation had taken place with regard to the telephone traffic of one of its journalists Anne de Graaf. Also the organisation of Flemish professional journalists and *Reporters sans Frontières* protested sharply against the inspection of reporters' phone records as a manifest disrespect for the confidentiality of journalistic sources. The Court of First Instance of Brussels, in a judgment of 29 June 2007, convicted the Belgian State for infringement of the journalist's freedom of expression as protected by Article 19 of the Belgian Constitution and Article 10 of the European Convention. It also recognised firmly the importance of the protection of journalistic sources.[32]

After long debates in Parliament, finally the law on the protection of journalistic sources of 7 April 2005 was promulgated and came into force on the 7th May 2005. The new law is very much in line with the Committee of Ministers' Recommendation No. R (2000)7 of 8 March 2000 to member States on the rights of journalists not to disclose their sources. The law not only formulates a broad notion of who is a journalist and what is protected information, it also reduces substantially the possibility of compelling journalists to reveal their sources, as well as any kind of investigative measures taken by the judicial authorities to circumvent the right of journalists not to reveal their sources. A disclosure order is only in accordance with the law if there are no alternative means of access and if the information in the possession of the journalist is crucial for the prevention of crime that constitutes a serious threat to the physical integrity of one or more persons. Journalists exercising their right to protection of sources cannot be prosecuted for "fencing" (handling stolen material, *heling / recel*), nor for complicity in the offence of breach of professional secrecy. In a judgment of 7 June 2006 the Court of Arbitrage (*Arbitragehof/Court d'Arbitrage*), the Belgian Constitutional Court, confirmed the constitutionality of the law on protection of journalistic sources, broadening for that purpose however the application of the law *"ratione personae*[33]*"*.

The protection of sources as referred to in Article 3 is (now) guaranteed in respect of the following ***persons*** (Article 2*)*:

- 1° Anyone directly contributing to the gathering, editing, production or distribution of information for the public by way of a medium

- 2° Editorial staff, which means anyone who in the exercise of his functions may be in a position to have knowledge on information that can lead to the revelation of a source, regardless whether this is through the gathering, the editorial treatment, the production or the distribution of this information.

According to the new law, journalists and members of the editorial staff have ***a right to refuse the disclosure of information*** upon request of the judicial authorities, in four different situations (Article 3):
-1° if the information may reveal the identity of a source;
-2° if the information may reveal the nature or the origin of that information;
-3° if the information may reveal the identity of the author of a text or an audiovisual production;
-4° if the disclosure may reveal the content of the information and of the documents themselves, if that may lead to the informant being identified.

Journalists or editorial staff can however exceptionally ***be compelled by a judge to disclose information*** revealing a source under the circumstances

[31] Supreme Court 1 December 2004, www.juridat.be. See also European Court of First Instance (President) 15 October 2004, Case T-193/04 R, Hans-Martin Tillack v. Commission of the European Communities, available at http://curia.eu.int

[32] ECtHR 27 November 2007, Tillack v. Belgium and Court of First Instance Brussels 29 June 2007, A&M 2007, 500. For more updated information, see D. VOORHOOF (ed.), *Het journalistiek bronnengeheim onthuld*, Brugge, Die Keure, 2008.

[33] Arbitragehof 7 June 2006, nr. 91/2006. See also D. VOORHOOF, "Arbitragehof verruimt toepassing journalistiek bronnengeheim", *De Juristenkrant* 2006/132, 17.

of Article 4 in a far as three cumulative conditions are fulfilled:
-1° the information relates to crimes that constitute a serious threat to the *physical integrity of one or more persons;*
-2° the requested information is of crucial importance for the prevention of these crimes;
-3° and the requested information cannot be obtained in another way.

According to Article 5 ***detection measures and investigative measures*** shall not apply to data relating to information sources of journalists and editorial staff, unless the data may prevent the crimes referred to in Article 4 and subject to the conditions set out under that Article.

Article 6 stipulates that journalists and editorial staff (the persons referred to in Article 2) ***cannot be prosecuted*** under Article 505 of the Belgian Criminal Code when they are exercising their right to keep silent about their sources. Article 505 of the Criminal Code punishes *inter alia* those who receive or use documents which have been stolen or have been obtained by crime (e.g. after breach of the duty of professional secrecy by others). Also in case of a breach of professional secrecy in the terms of Article 458 of the Criminal Code, the persons referred to in Article 2 ***cannot be prosecuted*** under Article 67, par. 4 of the Criminal Code when they are exercising their right to keep silent about their sources, which means that journalists and editorial staff in these circumstances cannot be prosecuted for complicity in the offence of breach of confidence.

Since May 2005 the Belgian law is protecting journalistic sources in accordance with Article 10 of the European Convention[34]. The Belgian law of 7 April 2005 can undoubtedly inspire other countries to develop new standards of protection of journalistic, "having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom"[35].

[34] Notice however that the law of 4 February 2010 on Special Investigative Measures by State Security and Intelligence Services reduces to some extent the protection guaranteed by the Law of 7 April 2005: Wet van 30 november 1998 houdende regeling van de inlichtingen- en veiligheidsdiensten, gew. Wet van 4 februari 2010 betreffende de methoden voor het verzamelen van gegevens door de inlichtingen- en veiligheidsdiensten, *BS* 10 maart 2010. The law of 4 February 2010 makes, under strict conditions and with extra procedural guarantees towards only professional journalists (in the sence of the law of 30 december 1963), investigative measures and searches possible when journalists themselves are under a serious suspicion of being personally and actively involved in activities with a 'potential threat' to security, such as state security, international relations, military security, economic and scientific potential, espionage, terrorism... For such specific or exceptional investigative measures no court order is required: the authorization is only needed by the director of the state security services, after having obtained a positive advice by a special commission or the competent Minister. The president of the association of professional journalists is informed in advance in case such specific or exceptional investigative measures or searches against professional journalists will be undertaken

[35] ECtHR 27 March 1996, Goodwin v. United Kingdom, *§ 39.* See also David BANISAR, *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources*, 2007, at www.privacyinternational.org. See also www.press-list.com/English/Release/OSCE2.php; http://immi.is/FAQ; http://europe.ifj.org/assets/docs/108/130/d6b586c-bfdac82.pdf; http://europe.ifj.org/assets/docs/056/152/eaea138-f017a98.pdf and www.snj.cgt.fr/deontologie/sources.html

ACCESS TO STATE-HELD INFORMATION AS A FUNDAMENTAL RIGHT UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Access to state-held information essential in a democratic society – traditional reluctance of the European Court of Human Rights to apply article 10 European Convention on Human Rights in access to information cases – positive obligations and new perspectives: initiatives within the Council of Europe – parallel with the Inter-American Court of Human Rights – Sdruženi Jihočeské Matky decision of the European Court: the beginning of a new era?

Background

The transparency of public administration is essential in a democratic society. A wide access to information on issues of general interest allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live. Access to information is, therefore, closely related to the freedom to hold opinions and to receive and impart information and ideas, guaranteed by Article 10 European Convention on Human Rights (ECHR). One could argue that a positive obligation for the State to supply relevant information and to give access to official documents regarding matters of public interest is inherent in this article. For many years the Strasbourg Court was reluctant to recognize this. However, there are indications that the Court's position is changing. A European right of access to information, connected with Article 10 ECHR, is drawing near.

A large majority of the 46 Council of Europe member states recognize a statutory right of access to state-held information.[1] Many of these states have incorporated freedom of information in their constitutions. For example, Article 110 of the Netherlands Constitution stipulates that an act of parliament must regulate the principle of open government. Article 32 of the Belgian Constitution takes a step further by creating a right of access to any administrative document for everyone, subject only to restrictions prescribed by law.[2] In France, the Conseil d'État considered that the right of access to administrative documents is a 'fundamental guarantee, accorded to the citizens for the exercise of public freedoms in the sense of Article 34 of the Constitution'.[3] Many other examples could be added.

In the context of European Union law, access to information has the status of a common constitutional tradition. The right of access to EU-documents is also guaranteed by Article 255 EC[4] and is confirmed by the Charter of Fundamental Rights (Nice, 7 December 2000), which is integrated in the Treaty establishing a Constitution for Europe (29 October 2004).[5] The main goal of the Charter is to reaffirm the fundamental rights as they result, in particular, from the constitutional traditions and international obligations common to the member states. Apart from a right of freedom of expression and information, including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers, laid down in Article 11 of the Charter (Article II-71 of the Treaty), Article 42 of the Charter (Article II-102 of the Treaty) provides that 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium'. This general right of access to documents of EU-institutions, bodies, offices and agencies differs from the specific right of every person to have access to his or her file, enshrined in Article 41 of the Charter (Article II-101 of the Treaty) as part of the right to good administration.
On 21 February 2002, the Committee of Ministers of the Council of Europe adopted a Recommendation on access to official documents.[6] The Recommendation contains a set of principles, to be used by member states in their law and practice. The key principle is formulated in Article

1 David Banisar, 'Freedom of Information Around the World 2006: A Global Survey of Access to Government Records Laws', at <www.freedominfo.org>.
2 See also Arbitragehof [Court of Arbitration] 25 March 1997, no. 17/97, *A.A.* 1997, 203 and *J.T.* 1997, 476.
3 Conseil d'État 29 April 2002, no. 228830 (Ullmann) and 13 December 2002, no. 237203 (Gabriel X).

III. Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. An applicant for an official document should not be obliged to give reasons for his request (Article V). Limitations of the right of access are possible, but they should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting a legitimate interest (Article IV). Article II deals with the scope of the recommendation, stating: 'This recom-mendation concerns only official documents held by public authorities. However, member states should examine, in the light of their domestic law and practice, to what extent the principles of this recommendation could be applied to information held by legislative bodies and judicial authorities'. Finally, Article XI of the Recommendation considers it a duty of a public authority 'at its own initiative and where appropriate, to take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest'.[7] Hence, the Recommendation recognizes both an enforceable subjective right of the citizen to have access, *on request*, to official documents and a positive obligation, a duty of the authorities to provide, *on their own initiative*, the public with relevant information in matters of public interest.

Recommendations are often the prelude to a treaty. Indeed, at their meeting on 3-4 May 2005 the Council of Europe Ministers' Deputies instructed the Steering Committee for Human Rights (CDDH) to prepare a legally binding instrument on access to official documents. The Steering Committee in their turn tasked the Group of Specialists on Access to Official Documents (DH-S-AC) with this activity. One of the first questions to be resolved concerned the legal form of the instrument. Should it be a self-standing convention or an additional protocol to an existing treaty? Should it be a traditional convention, fixing precise obligations for the parties, or a so-called 'framework convention' with programme-type provisions, setting out objectives which the parties undertake to pursue? And finally, should the new treaty provide for the possibility that member states accept (*á la carte*) some provisions and not others? In 2006, the Group of Specialists discussed a provisional text, with the advice of three civil society organisations: 'Access Info Europe', 'Article 19' and the 'Open Society Justice Initiative'.[8] The planning is that a traditional, self-standing, convention will be opened for signature in the second half of 2007.

[4] See also Regulation (EC) 1049/2001 of the European Parliament and of the Council of 29 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* L 145/43, 31.5.2001. See furthermore Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, *OJ* L 41/26, 14.02.2003; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, *OJ* L 156/17, 25.06.2003 and Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ* L 264/13, 25.9.2006. Both the Court of First Instance and the Court of Justice have elaborated a substantial case law on the matter of access to EU-documents, as e.g. CFI, *Carvel* v. *Council*, Case T-194/94 [1995] ECR II-2765; CFI, *World Wildlife Fund* v. *Commission*, Case T-105/95 [1997] ECR II-313; CFI, *Van der Wal* v. *Commission*, Case T-83/96 [1998] ECR II-545; CFI, *Svenska Journalistförbundet* v. *Council*, Case T-174/95 [1998] ECR II-2289; CFI, *Rothmans* v. *Commission*, Case T-188/97 [1999] ECR II-2463; CFI, *Hautala* v. *Council*, Case T-14/98 [1999] ECR II-2489; CFI, *Kuijer (I)* v. *Council*, Case T-188/98 [2000] ECR II-1959; CFI, *BAT* v. *Commission*, Case T-111/00 [2001] ECR II-2997; CFI, *Kuijer (II)* v. *Council*, Case T-211/00 [2002] ECR II-7 Feb.; CFI, *Turco* v. *Council*, Case T-84/03 [2003] ECR II-24 Nov.; CFI, *IFAW* v. *Commission*, Case T-168/02 [2004] ECR II-30 Nov.; CFI, *Verein für Konsumenteninformation* v. *Commission*, Case T-2/03 [2005] ECR II-13 April and CFI, *Technische Glaswerke Ilmenau GmbH* v. *Commission*, Case T-237-02, 14 December 2006;
ECJ, *Van der Wal and Netherlands* v. *Commission*, Joined Cases C-174/98 P and C-189/98 P [2000] ECR I-1; ECJ, *Hautala* v. *Council*, Case C-353/99 P [2001] ECR I-9565 and ECJ, *Mattila* v. *Council and Commission*, Case C-353/01 P, 22 January 2004.

[5] Article I-9 of the Treaty establishing a Constitution for Europe states that the Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights, which constitutes part II of the Treaty. The Treaty itself shall only enter into force after it has been adopted by each of the signatory countries.

[6] Rec (2002) 2. The text of the Recommendation, including the Explanatory Memorandum, at<www.coe.int/t/e/human_rights/media/4_documentary_resources>.

[7] The Explanatory Memorandum of the Recommendation also contains the provision that 'in order to allow easy access to official documents, the public authorities should provide the necessary consultation facilities, such as appropriate technical equipment, including that making use of new information and communication technology' (Art. X, Complementary measures).

[8] See <www.access-info.org>, <www.article19.org> and <www.justiceinitiative.org>.

RELUCTANCE OF THE COURT

The right to freedom of expression in Article 10 ECHR not only protects the communicator – the person that expresses his opinion or imparts information – but explicitly refers to the right to 'receive' information and ideas.[9] The general public as potential receivers is also protected. The Strasbourg Court has repeatedly recognized 'the right of the public to be properly informed'[10] and 'the public's right to be informed of a different perspective'.[11] A systematic censorship for school books implies, in the Court's view, a 'denial of the right to freedom of information'.[12] The Court considered 'that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest'. Nevertheless, the Court stopped short of accepting a duty of public authorities to actively provide information to the public. In the cases *Leander* v. *Sweden*, *Gaskin* v. *United Kingdom* and *Guerra and others* v. *Italy* the Court pointed out

'that freedom to receive information (..) basicly prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion'.[13]

The words 'in circumstances such as those of the present case' suggest that there might be situations in which a positive obligation for the State does exist. In its case law, however, the Court never established such a situation.[14] In its judgment of 15 June 2004 (*Sîrbu and others* v. *Moldova*) the Court made a sharp distinction between a right to receive information without interference from independent media on the one hand, and a right of access to state-held documents on the other. The Court considered that there had been no restriction of press freedom, 'since the applicants complained of a failure of the State to make public a Governmental decision concerning the military, the intelligence service and the Ministry of Internal Affairs'. Referring to its earlier case law, the Court reiterated that 'freedom to receive information (..) cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to disclose to the public any secret documents or information concerning its military, intelligence service or police'.[15] Again, the door was kept ajar to decide otherwise in future cases with different circumstances.

Thanks to the right to privacy, not all applicants were sent home empty-handed. As a matter of fact, Gaskin and Guerra did win their cases. The refusal by British childcare authorities to give Gaskin the information he had requested about his own childhood, without an adequate procedure, was considered to be a violation of Article 8 ECHR. Enabling people to understand their own childhood is closely connected with the right to respect for private life. It is easy to understand why the Court preferred to use Article 8 and not Article 10 in this case. Giving Gaskin the information he wanted, has little to do with 'open government' and providing the public an 'adequate view of the state of society in which they live'. Moreover, access to official documents as a guarantee for democracy cannot be restricted to

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9 Preventing a (legal) person from lawfully receiving transmissions of broadcasting programs is considered as an interference with the exercise of freedom of expression, as guaranteed by Article 10 ECHR: ECtHR 22 May 1990, *Autronic AG* v. *Switzerland*, § 47.

10 ECtHR 26 April 1979, *Sunday Times (n° 1)* v. *United Kingdom*, §§ 64-66 and ECtHR 29 October 1992, *Open Door and Dublin Well Woman* v. *Ireland*, § 55. See also ECtHR 8 July 1986, *Lingens* v. *Austria,* § 41; ECtHR 25 June 1992, *Thorgeir Thorgeirson* v. *Iceland,* § 63; ECtHR 23 September 1994, *Jersild* v. *Denmark,* § 31; ECtHR 25 August 1998, *Hertel* v. *Switzerland,* §§ 47-49; ECtHR 25 June 2002, *Colombani* v. *France,* §§ 55 and 64; ECtHR 13 February 2003, *Çetin and others* v. *Turkey,* § 64 and ECtHR 29 March 2005, *Ukrainian Media Group* v. *Ukraine,* § 38.

11 ECtHR 18 July 2000, *Sener* v. *Turkey*, § 46.

12 ECtHR 10 May 2001, *Cyprus* v. *Turkey*, § 252.

13 ECtHR 9 February 1998, *Guerra and others* v. *Italy*, § 53. Cf. ECtHR 26 March 1987, *Leander* v. *Sweden*, § 74; ECtHR 7 July 1989, *Gaskin* v. *United Kingdom*, § 52.

14 In a decision of 7 April 1997 (*Grupo Interpres* v. *Spain*) the European Commission of Human Rights applied Article 10 in a case concerning a refusal to allow a company free access to court archives for the purpose of obtaining information about potential borrowers. According to the Commission, Spain had not violated Article 10 ECHR, because 'l'étendue du droit à l'accès aux informations en cause est limité par le libellé du paragraphe 2 de l'article 10 de la Convention'. In other words, Article 10 was considered applicable, but the interference with the right to receive information was justified in the circumstances of the present case. This finding of an interference is obviously at variance with the reasoning of the European Court of Human Rights, considering Article 10 not to be applicable in such cases: Decision European Commission of Human Rights 7 April 1997, 32849/96, *Grupo Interpres S.A.* v. *Spain*, *D.R.* 89, p. 150.

15 ECtHR 16 June 2004, *Sîrbu and others* v. *Moldova*, § 18. See also, the decision ECtHR 18 May 2004, 42841/02, *Stephen Eccleston* v. *United Kingdom*.

a specific group of persons. The right to be properly informed about matters of public interest is a right of 'everyone'. Mr. Gaskin, however, would certainly object if the British authorities had opened his personal files for every citizen. Information about one's childhood is a purely private matter. Gaskin had the right to know, but 'outsiders' did not.

Like Gaskin, Mrs Guerra also successfully invoked Article 8 ECHR. The Italian government had failed in giving sufficient information about certain health risks, caused by a chemical factory in the area where she lived, and about evacuation plans in the event of an accident. Again, the Court decided that the State had violated a positive obligation inherent in Article 8.[16] Of course, health protection is an element of a person's private life, but one could argue that information about environmental risks is a matter of public interest as well and, therefore, relevant for a public debate. Indeed, the former European Commission of Human Right was of the opinion that the passive attitude of the Italian authorities in this case was a violation of Article 10 ECHR.[17] However, as we have seen, the Court finally decided that Article 10 was not applicable. Sceptics concluded that only in theory a positive obligation to provide information could be deduced from this article. They remarked that the text of Article 10 reflects the character of a negative right, as appears from the words 'without interference by public authority'.

The sceptic view was corroborated by the Roche judgment in 2005, when the Court decided once more that a refusal to give information was a violation of Article 8, but not of Article 10 ECHR.[18] In Roche, the Grand Chamber of the Court referred to the Leander, Gaskin and Guerra judgments and saw no reason 'not to apply this established jurisprudence'.

There are however a few developments and perspectives why the 'established jurisprudence' of the European Court of Human Rights might in the future find a new approach regarding the application of Article 10 of the Convention and the right of access to public documents.

Positive obligations and new perspectives

Since 2000, there can be no doubt that at least some positive obligations are inherent in Article 10 ECHR. In *Özgür Gündem* v. *Turkey* police authorities had remained passive when a controversial newspaper suffered from physical attacks, including killings, assaults and arson, by private persons. The Court concluded 'that the Government have failed, in the circumstances, to comply with their positive obligation to protect Özgür Gündem in the exercise of its freedom of expression.[19] In other judgments the Court considered that Article 10 required positive measures of protection in contractual relations between individuals.[20] More generally, Alastair Mowbray, referring to writings of Shue, states that *all* basic rights in the European Convention involve both negative and positive duties, although the specific balance between both categories will vary according to the particular right at issue. Even apparently 'negative rights', such as the prohibition of torture contained in Article 3, can embody significant positive obligations (e.g. to take vulnerable children into public care to protect them from abuse by their parents).[21]

Legislative initiatives within the Council of Europe, directed at strengthening the right of access to official documents, will stimulate the Court to accept that a positive obligation exists to provide relevant information to the general public. In its jurisprudence the Court acknowledges that Recommendations by the Committee of Ministers of the Council of Europe can be relevant for the interpretation of the Convention.[22] True, the Recommendation on access to official documents of 21 February 2002 did not have any influence on the Roche judgment of 19 October 2005, in which the Court denied applicability of Article 10 to a refusal to give access to informa-

[16] For the sake of completeness, it should be noted that Article 8 is not the only article to impose positive obligations on the State to give access to state-held information to specific persons. The same is true for Article 6 ECHR. Refusal by national tribunals to give access to certain legal documents can jeopardize the right to a fair hearing in a civil or criminal procedure: ECtHR 9 June 1998, *Mc Ginley and Egan* v. *United Kingdom*, §§ 84-90. Cf. ECtHR 2 February 1984, *Sutter* v. *Switzerland*; ECtHR 28 June 1984, *Campbell and Fell* v. *United Kingdom*; ECtHR 24 November 1997, *Werner* v. *Austria*; ECtHR 24 April 2001, *B. and P.* v. *United Kingdom*; ECtHR 28 September 2004, *Loiseau* v. *France* and ECtHR 7 February 2006, *Donnadieu (no. 2)* v. *France.*

[17] European Commission of Human Rights 29 June 1996, *Guerra* v. *Italy*, § 49.

[18] ECtHR 19 October 2005, *Roche* v. *United Kingdom*, §§ 172-173.

[19] ECtHR 16 March 2000, *Özgür Gündem* v. *Turkey*, § 46.

[20] ECtHR 29 February 2000, *Fuentes Bobo* v. *Spain*, § 38. Cf. ECtHR 28 June 2001, *Verein gegen Tierfabriken* v. *Switzerland*, § 45 and ECtHR 6 May 2003, *Appleby* v. *United Kingdom*, § 39.

[21] A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing 2004) p. 108-109.

tion.[23] However, an explanation could be that the information requested by Mr Roche was directly relevant for his personal health, which brings the matter essentially into the ambit of Article 8. Indeed, the Court decided that Article 8 had been violated. If the Recommendation on access to official documents is to be followed by a binding Treaty in 2007 or in 2008, the arguments for changing the Guerra approach would gain strength. After all, the Convention is a living instrument that has to be interpreted in the light of present day conditions. As the Grand Chamber of the European Court of Human Rights has stated in 2002:

'While the Court is not formally bound to follow its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (..). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (..). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement'.[24]

The European Court of Human Rights could also draw inspiration from its American counterpart, the Inter-American Court of Human Rights. On 19 September 2006, the Inter-American Court issued judgment in the case *Claude Reyes and others* v. *Chile*, concerning a refusal to give access to information.[25] Three environmental activists had requested information relating to the approval of a major logging project. At the time, Chile had no statute guaranteeing access to information and the authorities simply ignored the request. Before the Inter-American Court, the applicants relied on Article 13 of the Inter-American Convention on Human Rights, protecting – among other things – the freedom to seek and receive information.[26] The Inter-American Court unanimously found a violation of this article, stating 'that Article 13 protects the rights of all persons to request access to information held by the State, with the exceptions permitted by the restrictions regime of the Convention.[27] The restrictions regime of Article 13 closely resembles that of 'our' Article 10 ECHR: a restriction must be prescribed by law and be necessary for a legitimate aim. Interestingly, the Inter-American Court stressed the connection between the right of access to information held by the State and democracy.[28]

The Sdruženi Jihočeské Matky decision

On 10 July 2006 the European Court of Human Rights gave an admissibility decision in the case *Sdruženi Jihočeské Matky* v. *Czech Republic*.[29] The case concerned a refusal to give an ecologist Non Governmental Organisation access to documents and plans regarding a nuclear power station. Although the Court decided that there had not been a breach of Article 10, it explicitly recognised that the refusal by the Czech authorities was an interference with the right to receive information. Hence, the refusal had to meet the conditions set forth in Article 10 § 2. The Court declared the application manifestly ill-founded, because the criteria in § 2 had been met. It considered that the Czech authorities had motivated their refusal in a pertinent and sufficient way. Next, the refusal was justified for the protection of the rights of others (industrial secrets), in the interest of national security (risk of terrorist attacks) and for the protection of health. The Court also emphasized that the request to have

[22] See, e.g., ECtHR 9 May 2003, *Tepe* v. *Turkey*, § 181, referring to Recommendation No. R (99) 3 on the Harmonization of Medico-Legal Autopsy Rules (2 February 1999) and ECtHR 10 November 2005, *Leyla Şahin* v. *Turkey*, § 136, referring to Recommendation No. R (98) 3 on Access to Higher Education (17 March 1998). The latter judgment also referred to a recommendation by the Parliamentary Assembly of the Council of Europe, Rec. no. 1353 (1998) on the Access of Minorities to Higher Education (27 January 1998). See also ECtHR 9 November 2006, *Leempoel & SA Cine Revue* v. *Belgium*, § 78, referring to a resolution of the Parliamentary Assembly of the Council of Europe: Resolution 1165 (1998) on the right of privacy (24 June 1998). In its case law, the Court also regularly referred to other international instruments, treaties or EU-directives, as e.g. in ECtHR *Müller and Others* v. *Switzerland*, 24 May1988, § 27; ECtHR *Groppera Radio* v. *Switzerland,* 28 March1990, § 61; ECtHR *Autronic v. Switzerland,* 22 May1990, §§ 62-63; ECtHR *Jersild* v. *Denmark*, 23 September 1994, §§ 27 and 30-31; ECtHR *Bladet Tromsø and Stensaas* v. *Norway,* 20 May 1999, § 65; ECtHR *Nikula* v. *Finland*, 21 March 2002, §§ 27-28; ECtHR *A.* v. *UK*, 17 December 2002, §§ 33-36 and 81; ECtHR *Müslüm Gündüz* v. *Turkey*, 4 December 2003, §§ 22-24 and 40 and ECtHR *Murphy* v. *Ireland*, 10 July 2003, §§ 32 en 81.

[23] ECtHR 19 October 2005, *Roche* v. *United Kingdom*, §§ 172-173.

[24] ECtHR 11 June 2002, *Christine Goodwin* v. *United Kingdom*, § 74.

[25] Inter-American Court of Human Rights19 September 2006, *Claude Reyes and others* v. *Chile*, at <www.corteidh.or.cr>.

access to essentially technical information about the nuclear power station did not reflect a matter of public interest. For us, the crucial point however is the fact that Article 10 was considered to be applicable in the first place.

The relevant passage in the decision reads as follows:

In its judgments Guerra and others vs. Italy (judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, § 53), concerning the absence of information for the population on the health risks they might run and on the measures to be taken in the event of an accident in an adjacent chemical factory, and Roche vs. United Kingdom ([GC], no. 32555/96, § 172, ECHR 2005-...), referring to the absence of any procedure of access to information that might enable the applicant to evaluate the health risks resulting from his participation in military tests, the Court concluded that the afore-said freedom 'cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion'. The Court equally observes that it is difficult to derive from the Convention a general right of access to administrative data and documents (see, mutatis mutandis, Loiseau vs. France (decision), no. 46809/00, ECHR 2003-XII (extracts)).

In the present case, the applicant requested permission to consult administrative documents which were at the disposal of the authorities and to which citizens could have access under the conditions prescribed by Article 133 of the Construction Act, contested by the applicant. Under these circumstances, the Court recognizes that the rejection of the afore-said request constituted an interference with the right of the applicant to receive information (see, mutatis mutandis, *Grupo Interpres S.A.* vs. *Spain*, no. 32849/96, decision of the Commission of 7 April 1997, Decisions and Reports 89, p. 150).[30]

LOOKING AHEAD

Is Sdruženi Jihočeské Matky the beginning of a new era? The Court does not pay much attention to the difference with its earlier case-law. There could be a simple explanation for the fact that Article 10 was applicable this time, in contrast with the Guerra and Roche judgments. Maybe 'the circumstances of the present case' were decisive. In the passage, quoted above, the Courts mentions three characteristics of the Sdruženi Jihočeské Matky case.

– The applicant organisation had filed a request. The refusal of a request for information is indeed

[26] It is to be noticed that, in contrast with Article 10 ECHR and similar to Article 19 ICCPR, the right guaranteed by Article 13 of the American Convention on Human Rights (ACHR) also includes the freedom 'to seek' information and ideas, apart from the right to impart and receive information and ideas. Art. 13.1 ACHR states: 'Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice'. Art. 13.3. ACHR guarantees that 'the right of expression may not be restricted by indirect methods or means (..) or by any other means tending to impede the communication and circulation of ideas and opinions', see <www.oas.org>. This difference in wording between Article 13 ACHR and Article 10 ECHR however is not substantial. In recent case law the ECtHR has recognized that Article 10 ECHR also includes the right to seek information. The Court e.g. considered an interference with the right of a journalist to gather and to investigate information under the scope of Article 10 ECtHR. The Court noted that the case did not concern the restraining of a publication as such or a conviction following a publication, but a preparatory step towards publication, namely a journalist's research and investigative activities. The Court emphasized that this phase also fell within its scrutiny and even called for the most scrupulous examination on account of the great danger represented by that sort of restriction on the freedom of expression. In the original wording of the Court, the protection of Arcticle 10 implies 'les activités de recherche et d'enquête d'un journaliste. A ce titre, il y a lieu de rappeler que non seulement les restrictions à la liberté de la presse visant la phase préalable à la publication tombent dans le champ du contrôle par la Cour, mais qu'elles présentent même des grands dangers et, dès lors, appellent de la part de la Cour l'examen le plus scrupuleux', ECtHR 25 April 2006, *Dammann* v. *Switzerland*, § 52, see <www.echr.coe.int>. A right to seek information is also recognised in the Declaration on the freedom of expression of the Committee of Ministers of the Council of Europe, 29 April 1982, in which reference is made to the right of everyone 'regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them under the conditions set out in Article 10 of the European Convention on Human Rights', <www.coe.int/t/e/human_rights/media>

[27] In § 77 the Court considered: 'la Corte estima que el artículo 13 de la Convención (..) protege el derecho que tiene toda persona a solicitar el acceso a la información bajo el control del Estado, con las salvedades permitidas bajo el régimen de restricciones de la Convención'.

[28] § 84-87. In § 86 the Court considered: 'El acceso a la información bajo el control del Estado, que sea de interés público, puede permitir la participación en la gestión pública, a través del control social que se puede ejercer con dicho acceso'.

[29] Decision ECtHR 10 July 2006, 19101/03, *Sdružení Jihočeské Matky* v. *Czech Republic*. The name of the applicant can be translated as 'South Bohemian Mother Association'. Sdruženi Jihočeské Matky is established in České Budjovice. It is a non-political civil association whose mission it is to protect nature and the countryside. The association supports the enforcement of alternative methods of acquiring energy that are less of a burden to the environment and, above all, to limit the excessive consumption of energy by looking at ways of saving it. The association also attempts to act as a counter-balance to what it considers 'the one-sided nuclear lobby campaign enforcing the completion of the Temelín Nuclear Power Plant': www.jihoceskematky.cz/en/index.php

not the same as the failure by the authorities to spread information *motu proprio*. In the Guerra judgment and in the Roche judgment the Court explicitly stated that the freedom guaranteed by Article 10 cannot be construed as imposing on a State positive obligations to collect and disseminate information of 'its own motion'.[31] The Sdruženi Jihočeské Matky decision explicitly refers to this established jurisprudence of the Court not willing to derive from Article 10 an obligation of the State to provide information to the public *motu proprio*. It is to be underlined however that in other judgments and decisions of the Court Article 10 has been declared inapplicable also in cases where the applicant had requested to provide him with information or had sought access to personal records.[32] In the Sdruženi Jihočeské Matky decision the Court by clearly emphasizing the circumstance that the applicant had filed a request to have access to administrative documents, upgrades this circumstance to a relevant if not decisive element in order to make Article 10 applicable.

– The information was contained in administrative documents held by the public authorities. Therefore, the authorities did not need to collect, even less create, the information requested by the applicant.

– Unlike the applicant, other citizens had or could have access to the information, under the conditions prescribed by the Czech legislation. [33]

In the Sdruženi Jihočeské Matky decision the Court firmly puts forward that under such circumstances a refusal to provide a citizen or a legal person with the requested administrative documents must be in accordance with Article 10 of the Convention.

The Sdruženi Jihočeské Matky decision also makes clear that the right to have access to public documents cannot be an absolute one: 'as the exercising of the right to receive information can damage the right of others, the security of the state or the public health, the scope of the right to have access to the relevant information is limited by the wording of the second paragraph of Article 10 of the Convention'.[34] This approach brings the evaluation of a refusal of the right of access to public documents within the scope of the conditions set forth in Article 10 § 2 of the Convention, which implies that such a refusal must be prescribed by law, be based on a legitimate aim and especially must be necessary in a democratic society. Referring to the case law of the Strasbourg Court, this means that when the requested documents are related to a matter of public interest, a matter of serious public concern or an ongoing political debate, the states will be under a strict scrutiny whether the reasons invoked to refuse a request for access to such documents, were relevant and sufficient.[35]

It is important that for the first time the European Court of Human Rights actually applied Article 10 ECHR in an access to information case. Hopefully, further steps will follow. The material provisions of the future treaty on access to information, currently under discussion in

[30] Our translation. The original French version reads:
'Dans ses arrêts *Guerra et autres* c. *Italie* (arrêt du 19 février 1998, Recueil des arrêts et décisions 1998I, § 53), concernant l'absence d'informations de la population sur les risques encourus et sur les mesures à prendre en cas d'accident dans une usine chimique du voisinage, et *Roche* c. *Royaume-Uni* ([GC], n° 32555/96, § 172, CEDH 2005...), portant sur l'absence de toute procédure d'accès à des informations qui auraient permis au requérant d'évaluer les risques pour sa santé pouvant résulter de sa participation à des tests militaires, la Cour a conclu que ladite liberté « ne saurait se comprendre comme imposant à un Etat, dans des circonstances telles que celles de l'espèce, des obligations positives de collecte et de diffusion, motu proprio, des informations ». La Cour observe également qu'il est difficile de déduire de la Convention un droit général d'accès aux données et documents de caractère administratif (voir, mutatis mutandis, *Loiseau* c. *France* (déc.), n° 46809/99, CEDH 2003XII (extraits)).
En l'occurence, la requérante a demandé de consulter des documents administratifs qui étaient à la disposition des autorités et auxquels on pouvait accéder dans les conditions prévues par l'article 133 de la loi sur les constructions, contesté par la requérante. Dans ces conditions. la Cour admet que le rejet de ladite demande a constitué une ingérence au droit de la requérante de recevoir des informations (voir, mutatis mutandis, Grupo Interpres S.A. c. Espagne, no. 32849/96, décision de la Commission du 7 avril 1997, Décisions et rapports 89, p. 150).

[31] ECtHR 9 February 1998, *Guerra and others* v. *Italy*, § 53 and ECtHR 19 October 2005, *Roche* v. *United Kingdom*, §§ 172-173. See also ECtHR 16 June 2004, *Sîrbu and others* v. *Moldova*.

[32] Decision ECtHR 18 May 2004, 42841/02, *Stephen Eccleston* v. *United Kingdom*. See also ECtHR 26 March 1987, *Leander* v. *Sweden* and ECtHR 7 July 1989, *Gaskin* v. *United Kingdom*, § 52.

[33] Notice that the request by Sdruženi Jihočeské Matky did not concern personal data or personal records regarding the applicants themselves, like in some other cases where the Court considered, 'under such circumstances' Article 10 not applicable: ECtHR 26 March 1987, *Leander* v. *Sweden;* ECtHR 7 July 1989, *Gaskin* v. *United Kingdom*; Decision ECtHR 18 May 2004, 42841/02, *Stephen Eccleston* v. *United Kingdom* and ECtHR 19 October 2005, *Roche* v. *United Kingdom*.

[34] Our translation. The original French version reads:'En effet, lorsque l'exercice du droit à recevoir des informations peut porter atteinte aux droits d'autrui, à la sûreté publique ou à la santé, l'étendue du droit à l'accès aux informations en cause est limitée par le libellé du paragraphe 2 de l'article 10 de la Convention'.

the Council of Europe, can therefore be an important guideline. Probably, this treaty will establish a monitoring system of its own. A traditional mechanism of follow-up is to confer the monitoring task to a committee of experts representing the States. Typically, these experts only have the power to make recommendations. For a human right essential in a democratic society that is not sufficient. The national authorities and domestic courts directly applying the European Convention on Human Rights and if need be the European Court of Human Rights should fill the gap by judging individual complaints under Article 10 ECHR.[36] The Inter-American Court of Human Rights in 2006 has set a good example.

P.S. For the most recent developments in the European Case Law regarding access to official documents, see ECtHR, *Társaság a Szabadságjogokért (TASZ) v. Hungary,* 14 April 2009 and ECtHR, *Kenedi v. Hungary*, 26 May 2009. See also the *Council of Europe Convention on Access to Official Documents*, Adopted by the Committee of Ministers on 27 November 2008, www.coe.int and http://conventions.coe.int/Treaty/Commun/-Cher-
cheSig.asp?NT=205&CM=&&DF=&CL=ENG. See also www.access-info.org.

[35] ECtHR16 November 2004, *Selistö* v. *Finland*; ECtHR16 November 2004, *Karhuvaara en Iltalehti* v. *Finland*; ECtHR 29 March 2005, *Ukrainian Media Group* v. *Ukraine*; ECtHR 27 Juli 2005, *Grinberg* v. *Russia*; ECtHR 6 September 2005, *Salov* v. *Ukraine*; ECtHR 31 January 2006, *Giniewski* v. *France*; ECtHR 25 April 2006, *Stoll* v. *Switzerland*; ECtHR 25 April 2006, *Dammann* v. *Switzerland*; ECtHR 2 May 2006, *Aydin Tatlav* v. *Turkey*; ECtHR 4 May 2006, *Alinak* v. *Turkey*; ECtHR 6 June 2006, *Erbakan t. Turkey*; ECtHR 10 August 2006, *Lyaskho* v. *Ukraine*; ECtHR 21 September 2006, *Monnat* v. *Switzerland*; ECtHR 5 October 2006, *Zakharov* v. *Russia*; ECtHR 7 November 2006, *Mamère* v. *France*; ECtHR 14 December 2006, *Karman* v. *Russia;* ECtHR 19 December 2006, *Radio Twist, SA* v. *Slovakia* and ECtHR 19 December 2006, *Dabrowski t. Poland.*

[36] Actually pending before the ECtHR is application no. 11721/04, in *Geraguyn Khorhurd Patgamavorakan Akumb* v. *Armenia*. This case involves the alleged failure of an Armenian election authority to provide to the applicant organisation information related to its decision making processes, as well as data regarding the campaign contributions and expenses of certain political parties. The basic legal issue raised by the case is whether Article 10 of the Convention grants individuals and other persons a general right of access to information held by public authorities.

FREEDOM OF EXPRESSION UNDER THE EUROPEAN HUMAN RIGHTS SYSTEM. FROM SUNDAY TIMES (NO. 1) V. U.K. (1979) TO HACHETTE FILIPACCHI ASSOCIES ('ICI PARIS') V. FRANCE (2009)

IN: INTER-AMERICAN AND EUROPEAN HUMAN RIGHTS JOURNAL, 2010/1-2, 3-49

Dirk VOORHOOF

1. INTRODUCTION

Europe has a long tradition in guaranteeing freedom of speech and press freedom. The Royal Decree on the Freedom of the Press in Sweden (1766, *Tryckfrihetsförordning*) is generally recognised as the first example in Europe of legal protection with constitutional status guaranteeing press freedom and prohibiting censorship. In 1789 Article 11 of the *Déclaration des Droits de l'Homme et du Citoyen* (Declaration of the Rights of Men and Citizens in France provided that "*free communication of ideas and opinions is one of the most precious of the rights of man. Consequently, every citizen may speak, write and publish freely, although he may have to answer for the abuse of that liberty in the cases determined by law*".[1] Gradually, all parliamentary democracies in Europe have guaranteed freedom of expression and media freedom in their constitutions. The practice and application of freedom of speech and of the press however has often been, and to some extent still is, problematic. In some periods of time and specifically in the areas of state security, public order, morals and religion, the right to freedom of expression has not always been respected by governments, executive bodies or judicial authorities. Still the general tendency is that the scope and level of protection of freedom of expression and information has been extended and upgraded over the years in Europe and that public authorities have been less involved in prior restraint, censorship and oppression.[2]

The right to freedom of expression and information is actually guaranteed by Article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms (hereafter: the European Convention, or: the Convention) in all 47 member states of the Council of Europe, from Norway to Cyprus, from Iceland to Azerbaijan and from Portugal to Russia.[3] The development towards more freedom of speech and media freedom has undoubtedly been influenced by the expanding impact of Article 10 of the Convention which guarantees freedom of expression "*without interference by public authority*" and "*regardless of frontiers*".[4] Article 10 of the Convention, and the way this article has been interpreted and applied by the European Court of Human Rights[5] and promoted by the Council of Europe[6], has manifestly helped to upgrade the level of freedom of speech and media freedom in countries that became member states of the European Convention after the fall of the Berlin Wall (9 November 1989), such as the Baltic states (Estonia, Lithuania and Latvia), the Czech Republic, Slovakia, Hungary and Slovenia.[7] But also in countries that already had a longstanding constitutional and democratic tradition, the right to freedom of expression and information has been broadened, strengthened and upgraded under the influence

1 In the same period, "freedom of speech, and of the press", was also guaranteed by the First Amendment of the U.S. Constitution (1791), prohibiting Congress from abridging these freedoms.

2 Internet regulation, filtering and surveillance related to the war on terror shows a tendency however to reduce some areas of freedom of expression and media freedom in Europe since 9/11. See D. Banisar, *Speaking of Terror. A survey of the effects of counter-terrorism legislation on freedom of the media in Europe* (Strasbourg, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs, Council of Europe, 2008) and Ministers responsible for Media and New Communication Services, *Resolution: Developments in anti-terrorism legislation in Council of Europe member states and their impact on freedom of expression and information*, MCM(2009)011, Reykjavik, 29 May 2009, at <www.coe.int/t/dghl/standardsetting/media/MCM(2009)011_en_final_web.pdf >. See also for a comparative analysis, S. Sottiaux, *Terrorism and the Limitation of Rights. The ECHR and the US Constitution* (Oxford and Portland, Oregon, Hart Publishing, 2008), p. 67-152.

3 For more information about the Council of Europe, see <www.coe.int>.

4 For more information about the European Convention (signed on 4 November 1950), see <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>.

5 For more information about the European Court of Human Rights (established in 1959), see <www.echr.coe.int>. References in this article to the European Court (ECtHR) all imply judgments, unless indicated that it concerns a decision (on the admissibility, with additional reference to the case number).

6 For more information, see <www.coe.int/t/dghl/standardsetting/media/ >.

7 See the positive developments in these countries reflected in the press freedom indexes of Reporters without Borders and Freedom House, *cfr. infra* footnote 30.

of Article 10 of the European Convention. In countries in which press freedom and freedom of (political) expression is still (very) problematic, such as e.g. in Turkey, Azerbaijan, Russia, Georgia, Armenia, Moldova and Ukraine, Article 10 of the Convention has become a crucial instrument to motivate or even compel national authorities to abstain from interferences in freedom of speech and press freedom and to respect freedom of public debate, political expression and critical journalism to a higher degree. From this perspective, Article 10 of the European Convention is perceived as "*Europe's First Amendment*".[8]

Article 10 of the European Convention reads as follows:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".*

Article 10 (1) stipulates the principle of the right to freedom of expression, while Article 10 (2), by referring to "*duties and responsibilities*" that go together with the exercise of this freedom, opens the possibility for public authorities to interfere in this freedom by way of formalities, conditions, restrictions and even penalties. Yet, the main characteristic of Article 10 (2) is precisely that, by imposing the so-called 'triple test', it reduces substantially the possibility of interference in the right to receive and impart information and ideas. Interferences by public authorities are only allowed under the strict conditions that any restriction or sanction must be '*prescribed by law*'[9], must have a '*legitimate aim*', and finally and most decisively, must be '*necessary in a democratic society*'.

This analysis will focus on some of the characteristics of the case law developed by the European Court of Human Rights applying Article 10 of the Convention.[10] The European Court's practice over a period of more than 30 years[11] illustrates how the Court's case law has manifestly helped to create an added value for the protection of freedom of expression, journalistic freedom, freedom of the media and public debate in the member states of the Convention.[12] Article 10 of the Convention as interpreted by the European Court has contributed manifestly to guarantee a higher level of protection of freedom of expression in addition to the constitutional protection in the member states and complementary to other

[8] D. Voorhoof, "Guaranteeing the freedom and independence of the media", in X., *Media and democracy* (Strasbourg, Council of Europe Publishing, 1998), p. 35-57. See also D. Voorhoof in *Mediaforum, Tijdschrift voor Media en Communicatierecht*, 1994/11, 116-124, 1995/11-12, 128-137, 1999/10, 264-271, 1999/11, 304-313, 2004/4, 106-116 en 2004/6, 198-211.

[9] Only in a few cases the Court came to the conclusion that the condition "prescribed by law", which includes foreseeability, precision and publicity or accessibility and which implies a minimum degree of protection against arbitrariness, was not fulfilled: ECtHR, *Herczegfalvy v. Austria*, 24 September 1992; ECtHR, *Steel and Others v. U.K.*, 23 September 1998; ECtHR, *Hashman and Harrup v. U.K.*, 25 November 1999; ECtHR, *Gaweda v. Poland*, 14 March 2002; ECtHR, *Karademirci a.o. v. Turkey*, 25 January 2005; ECtHR, *Goussev and Marenk v. Finland*, 17 January 2006; ECtHR, *Soini a.o. v. Finland*, 17 January 2006; ECtHR, *Štefanec v. Czech Republic*, 18 July 2006; ECtHR, *Dzhavadov v. Russia*, 27 September 2007 and ECtHR, *Meltex Ltd. and Mesrop Movsesyan v. Armenia*, 17 June 2008**.** See also ECtHR, *Sunday Times (n° 1) v. U.K.*, 26 April 1979; ECtHR, *Association Ekin v. France*, 17 July 2001; ECtHR, *Çetin v. Turkey,* 13 February 2003 and ECtHR, *Peev v. Bulgaria*, 26 July 2007.

[10] The 47 member states that at present have ratified the Convention are Albania, Andorra, Austria, Armenia, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. Some 800 million of people are actually living under the protection of the European Convention on Human Rights and Fundamental Freedoms, as a "minimum rule" of human rights protection (art. 53 Convention).

[11] The jurisprudence analysed in this article focuses on the case law since April 1979, (ECtHR, *Sunday Times (n° 1) v. U.K.*, 26 April 1979, the first judgment in which the Court found a violation of Article 10) until July 2009 (ECtHR, *Wojtas-Kaleta v. Poland*, 16 July 2009; ECtHR, *Willem v. France*, 16 July 2009; ECtHR, *Féret v. Belgium*, 16 July 2009 and ECtHR, *Hachette Filipacchi Associés ("Ici Paris") v. France*, 23 July 2009), all together more than 600 judgments related to Article 10 of the Convention, freedom of expression, media and journalism.

International Treaties protecting freedom of expression and information.[13]

An important aspect that has helped to develop and enforce this right is the strict scrutiny by the European Court of interferences by national authorities in freedom of expression on matters of public interest, and especially regarding the freedom of political expression and the role of the press as "public watchdog". The recognition by the European Court of a horizontal effect of Article 10 and of the positive obligations for member States to protect the right to freedom of expression, has further extended the scope of the right to freedom of expression in Europe. Another important factor that is contributing to a substantial and sustainable impact of Article 10 is the high level of protection the Court has recognized *vis à vis* journalistic sources, whistleblowers, the gathering of news and information, and more recently, the right of access to information held by public authorities. The Court has manifestly upgraded freedom of expression of individuals, journalists, artists, academics, opinion leaders, NGOs and activists regarding their rights to receive, gather and impart information contributing to public debate in society. However, some restrictive trends in the approach of the Strasbourg Court have recently been identified, especially in a number of Grand Chamber judgments. The outcome and rationale of some judgments in which the Court has found no violation of the right to freedom of expression have raised some concerns regarding the (future) level of protection of press freedom in Europe compared to the 'traditional' high standards of the Strasbourg case law in this matter[14], a concern that is also reflected in dissenting opinions in annex to some judgments finding no violation of Article 10 of the Convention.[15]

2. FREEDOM OF EXPRESSION AND THE EUROPEAN COURT OF HUMAN RIGHTS

"*Abusing*" freedom of expression in all European States can be sanctioned in one or another way.[16] Various laws and regulations are indeed restrict-

[12] Also other institutions and instruments of the European Convention on Human Rights and of the Council of Europe play an important role in monitoring and enforcing freedom of expression as guaranteed under Article 10 of the Convention, such as the Committee of Ministers supervising the execution of the Court's judgments and the Parliamentary Assembly and the Committee of Ministers promulgating resolutions, declarations and recommendations in order to promote the awareness for and develop guarantees in favour of freedom of expression, in relation e.g. with court reporting, protection of journalistic sources, access to official documents, the right to reply, public service media, coverage of election campaigns, the media in the context of the fight against terrorism, Internet filters, blasphemy, religious insults and hate speech. Aspects of freedom of expression are also reflected in and guaranteed by some Council of Europe Conventions, such as the Revised European Convention on Transfrontier Television (ECTTV) and the European Convention on Access to Official Documents (27 November 2008). The Council of Europe also promotes professional standards in the media and self-regulatory formats stimulating journalistic ethics or respecting ethical and basic democratic values on the Internet. For more information, see the website of the Council of Europe on Media and Information Society, <www.coe.int/t/dghl/standardsetting/media/>.

[13] Exceptionally Constitutional law or International Treaties guarantee freedom of expression to a higher level. See e.g. Article 19 and 25 of the Belgian Constitution prohibiting prior restraint. See also the application of Article 5 of the German Basic Law (*Grundgesetz*) by the German Constitutional Court and the ECtHR, *Von Hannover v. Germany*, 26 April 2004. See also Article 19 of the UN Covenant on Civil and Political Rights (ICCPR - 1966, in force since 1976), guaranteeing freedom of expression, including the freedom "*to seek*" information and ideas. Article 19 ICCPR also guarantees the freedom of expression "*in the form of art*". Article 11 of the Charter of Fundamental Rights of the European Union guarantees the respect for "*the freedom and pluralism of the media*".

[14] See the proceedings and conclusions of the Seminar on the European Protection of Freedom of Expression:Reflections on Some Recent Restrictive Trends, Strasbourg 10 October 2008, <www-ircm.u-strasbg.fr/seminaire_oct2008/index.htm>.

[15] See e.g. ECtHR (Grand Chamber), *Lindon, Otchakovsky-Laurens and July v. France,* 22 October 2007, in which the dissenting judges express the opinion that the Court's judging no violation of Article 10 of the Convention is "*a significant departure from the Court's case-law in matters of criticism of politicians*". In *Stoll v. Switzerland* (ECtHR (Grand Chamber), 10 December 2007) the dissenting opinions consider the Court's judgment by finding no violation of Article 10 "*a dangerous and unjustified departure from the Court's well established case-law concerning the nature and vital importance of freedom of expression in democratic societies*". See also the dissenting opinion in the case of *Féret v. Belgium* (ECtHR, 16 July 2009) in which the dissenting judges argue why they disagree with the majority of the Court finding no violation of Article 10 regarding the conviction for 'hate speech' of the leader of a political party. The dissenting judges express the opinion that by confirming the criminal repression of political debate in this case, the Court neglects the essence of freedom of expression: "*confirmer la répression pénale du discours politique en l'espèce va à l'encontre de la liberté d'expression*". See also the dissenting opinions in ECtHR, *Flux (n° 6) v. Moldova,* 29 July 2009; ECtHR, *Saygili and Falakaoğlu (n° 2) v. Turkey*, 17 February 2009; ECtHR, *G.C.I.L. and Cofferati v. Italy*, 24 February 2009; ECtHR, *Sanoma Uitgevers BV v. The Netherlands*, 31 March 2009; ECtHR, *Standard Verlags GmbH (n° 2) v. Austria*, 4 June 2009; ECtHR, *Willem v. France*, 16 July 2008 and ECtHR, 16 July 2006, *Féret v. Belgium.* See also the dissenting opinions in ECtHR (Grand Chamber), *Pedersen and Baadsgaard v. Denmark*, 17 December 2004; ECtHR, *I.A. v. Turkey*, 13 September 2005; ECtHR, *Tourancheau and July v. France*, 24 November 2005 and ECtHR, *Hachette Filipacchi Associés v. France*, 14 June 2007.

ing freedom of expression and media content, determining the responsibility of every person under the law. The aim of such restrictions is to protect the national states' interests (protection of state security and public order), the protection of morals, the protection of reputation or privacy or more generally "the rights of others", the protection of confidentiality of information, or the authority and impartiality of the judiciary. Other legal provisions are prohibiting and punishing "hate speech" that incites to violence, racism, xenophobia or discrimination. Also broadcasting law, audiovisual media services regulations and legal provisions on advertising or other forms of 'commercial speech' contain restrictions on freedom of expression or on media content.[17]

Until a few decades ago, the limits and restrictions of freedom of expression were determined by national states, ultimately scrutinised by their own domestic judicial authorities, without any further external control. This situation, this '*paradigm*' has significantly changed in Europe, due to the achievement of the European Convention of Human Rights and the enforcement machinery in which the European Court of Human Rights plays a crucial role.

With the judgment in the case of *Sunday Times (n° 1) v. U.K.* (26 April 1979)[18] it has become clear that Article 10 of the European Convention is effectively reducing the national sovereignty and the scope of national limitations restricting the right to freedom of expression and information. In the *Sunday Times* case the European Court of Human Rights for the first time[19] reached the conclusion that the right to freedom of expression had been violated by national authorities, in a case of prior restraint of judicial reporting.[20] This judgment has effectively added an extra layer of protection on freedom of expression and made clear that Article 10 of the Convention is not only to be respected by government and parliament, but also by the judicial authorities in the member states.[21] The judgment in the *Sunday Times* case most importantly emphasized that freedom of expression "*constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*". It also stated that this freedom "*is subject to the exceptions set out in Article 10 § 2, which must, however, be interpreted narrowly*". The Court held that there had been a violation of Article 10 by reason of an injunction restraining the publication in the *Sunday Times* of an article concerning a drug and the litigation linked to its use (thalidomide case). The injunction, based on the common law concept of contempt of court, was not found to be "*necessary in a democratic society*" in the eyes of the Court. With the judgment in the *Sunday Times* case the European Court established, hesitantly although at the time[22], a higher level of protection for journalistic reporting on matters of public interest, also recognising "*the*

16 For an interesting analysis of the notion of "abuse" of human rights, see A. Sajó (ed.), *Abuse: the dark side of fundamental rights* (Utrecht, Eleven International Publishing, 2006).

17 For a an overview and analysis, see A. Nicol, G. Millar and A. Sharland, *Media Law & Human Rights* (Oxford, Oxford University Press, 2009).

18 A few years before, in its first judgment on freedom of expression (ECtHR, *Handyside v. U.K.*, 7 December 1976), the Court firmly emphasized the importance of freedom of expression in a democratic society, but *in casu* found no breach of Article 10 of the Convention, as the protection of minors was considered to justify the interference by public authorities against the "*Little Red Schoolbook*" and its publisher, Mr. Handyside.

19 See however also ECtHR 27 March 1962, *De Becker v. Belgium*. After the Commission's finding of a double infringement (in time and extent) of Article 10 by a Belgian law restricting a journalist's rights, the Belgian Parliament modified the law before the case was brought before the Court. The European Court struck the case off the list, satisfied with the modifications in the Belgian law and referring to the fact that the applicant regarded it as unnecessary to proceed with his application. The Court was of the opinion that there was no need to proceed *ex officio* with the case.

20 Compared to the 1976 judgment in the *Handyside* case, the Court in 1979 in the *Sunday Times* case went a step further by not only referring in general terms to the importance of freedom of expression in a democratic society, but also by applying *in concreto* a high standard of protection of freedom of expression and press freedom. By awarding journalistic reporting on matters of public interest such a high level of protection, the Court obviously reduced the margin of the member states to interfere in their citizens' freedom of expression and especially the freedom of the press to report critically on matters of public interest.

21 Regardless of how precisely the European Convention is internally applied or guaranteed in the member states (monistic or dualistic approach). In some countries the European Convention is given precedence over national law and the provisions of the Convention have direct effect; in other countries the Convention has been incorporated into domestic law introduced by a statute (e.g. the U.K. *Human Rights Act* 1998) or by an approval in the Constitution (e.g. the *Zustimmungsgesetz* under Art. 59 of the German Constitution (*Grundgesetz*)).

22 Indeed, the European Court only with a small majority (11/9) came to the conclusion that there was a violation of Article 10 of the Convention, overruling the House of Lords regarding its interpretation of a specific common law application.

right of the public to be properly informed" about matters of interest for society.

Since the *Sunday Times* judgment an abundant case law of the European Court of Human Rights has made clear that national law prohibiting, restricting or sanctioning expressions or information as forms of public communication may only be applied if the interference by the authorities based on this law and justified by a legitimate aim, is to be considered as "*necessary in a democratic society*". It is the European Court itself that has determined and elaborated the characteristics of this vague and open notion of what is to be considered necessary in a democratic society in terms of limiting freedom of expression and information. The Court on many occasions has reiterated that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that "*offend, shock or disturb*". According to the European Court, such are "*the demands of pluralism, tolerance and broadmindedness*" without which there is no democratic society. In its case law the European Court of Human Rights has permanently emphasized the importance of press freedom and debate on matters of public interest as inherent characteristics and necessary conditions for a democratic society. According to the Court's case law, an open, pluralistic and democratic society by it self is the most effective, if not the only, guarantor for respect for human, civil, political, cultural and social rights and freedoms. This means that Article 10 has to be interpreted from a perspective of a high level of protection of freedom of expression and information, even if expressed opinions or information are harmful to the State or some groups, enterprises, organisations or public figures. As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly. The need for any restrictions must be established convincingly, precisely because freedom of expression is considered essential for the functioning of a democratic society.[23]

If there are no sufficient and pertinent reasons for an interference in one's freedom of expression or if an interference by the authorities is disproportionate to the legitimate aim pursued, the sanctioning of individuals, journalists, editors, publishers, or broadcasters on the basis of even legitimate, sufficiently precise, transparent and non-discriminatory national law restricting freedom of expression, is considered by the Strasbourg Court as violating Article 10 of the Convention.[24] The dynamic interpretation by the Court of what is to be considered "*necessary in a democratic society*" together with the limitation of the "*margin of appreciation*" by the member states has been crucial for the impact of Article 10 of the Convention on the protection of freedom of expression in Europe. From this perspective, the Court, as a kind of a European Constitutional Court of Human Rights, be it a "*quasi-Constitutional Court sui generis*",[25] played an important role in interpreting and applying the open texture of Article 10 and in determining and developing the actual scope and level of freedom of expression and information in Europe.

With the *Sunday Times* (n° 1) case as a take-off, followed years later by the judgments in *Barthold v. Germany* (25 March 1985) and *Lingens v. Austria* (8 July 1986), many European countries ever since have been found in violation with Article 10 after journalists, publishers, broadcasting organisations, individual citizens, civil servants, academics, politicians, artists or non-governmental organisations applied to the European Court for being a victim of an illegitimate, unjustifiable or disproportionate interference in their freedom of expression. As a consequence of this case law by the Strasbourg Court and due to the binding character of the Convention, the member states are under a duty to modify and upgrade their standards of protection of freedom of expression in order to comply with their obligations under the European Convention (Article 1). This approach affects particularly the level of protection of journalistic reporting, political debate and discussion on matters of public interest, pushing

[23] See ECtHR (Grand Chamber), *Pedersen and Baadsgaard v. Denmark*, 17 December 2004 and ECtHR, *Raichinov v. Bulgaria*, 20 April 2006. For a solid introduction, see E. Dommering, "Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): Freedom of Expression", in O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law* (Austin, Boston, Chicago, New York and The Netherlands, Wolters Kluwer, 2008), p. 35-80 and E. Barendt, *Freedom of Speech* (Oxford, Oxford University Press, 2005).

[24] See e.g. ECtHR, *Fressoz and Roire v. France*, 21 January 1999; ECtHR, *Du Roy and Malaurie v. France*, 3 October 2000; ECtHR, *Thoma v. Luxembourg*, 29 March 2001; ECtHR, *VGT Verein gegen Tierfabriken v. Switzerlan*d, 28 June 2001; ECtHR, *Colombani a.o. v. France*, 25 June 2002 and ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005.

[25] L. Wildhaber, "A Constitutional Future for the European Court of Human Rights?', 23 *Human Rights Law Review (*2002), p. 161.

back some traditional limits of freedom of expression in many countries.

The most recent judgment of the European Court illustrating the far reaching and sometimes unexpected impact on freedom of expression and press reporting is the judgment in the case of *Hachette Filipacchi Associés ("Ici Paris") v. France* (23 July 2009). In this case the Court was called upon to settle a conflict of fundamental rights between the right of privacy, including the right of one's reputation and image (Article 8 of the Convention) and a publishing company's right to freedom of expression, following the publication of an article in the magazine "*Ici Paris*" about the French (ex-) rock star Johnny Hallyday. The article had focussed on the financial difficulties and the extravagant tastes of Mr. Hallyday. The French courts considered the article, which was also illustrated with some photographs, as breaching the right to respect of the private life of Mr. Hallyday and disrespecting the right of his image ("*droit à l'image*"). The publishing company was ordered by the Court of Appeal to pay EUR 20,000 in damages to Mr. Hallyday, together with costs and expenses. Referring to several characteristics of the article, its content and its context, the European Court came to the conclusion that the limits attached to the exercise of journalistic freedom in a democratic society had not been overstepped by the article in "*Ici Paris*", although the Court recognised that the article did not contribute to any debate of public interest for society. The European Court was of the opinion that the French courts, although having a broader margin of appreciation under these conditions, in their assessment of the publishing company's liability had not struck a fair balance between the conflicting interests at stake. The Court concluded that there had been a violation of Article 10 of the Convention.[26]

In between *Sunday Times (n°1) v. U.K.* in 1979 and *Hachette Filipacchi Associés ("Ici Paris") v. France* in 2009 the European Court in about 600 judgments has determined and clarified the scope and the limits of the right to freedom of expression in Europe.

The European Court of Human Rights on freedom of expression and rights of journalists/media: number of cases and violations 1960-2008.

1960 - 1969	1	*De Becker v. Belgium*, struck off the list
1970 - 1979	3	1 violation: *Sunday Times n° 1 v. U.K.*
1980 - 1989	12	2 violations: *Barthold v. Germany* and *Lingens v. Austria*
1990 - 1999	75	38 violations
2000 - 2008	460	315 violations
2000	14	10 violations
2001	13	8 violations
2002	26	13 violations 9 friendly settlements
2003	30	16 violations 7 friendly settlements
2004	45	30 violations 1 friendly settlement
2005	65	45 violations 3 friendly settlements
2006	85	60 violations
2007	100	85 violations
2008	82	47 violations

As the figures above show, especially the last 10 years the European Court frequently came to the conclusion that the right to freedom of expression has been violated by a member state.[27] In many other cases the Court agreed however with the defending State and declared the application inadmissible or, in a later stage, came to the conclusion that an interference was in accordance with the "triple test" of Article 10 of the Convention, finding no violation of freedom of expression.

The practical, effective or real impact of Article 10 still differs from one member state to another,

[26] ECtHR, *Hachette Filipacchi Associés ("Ici Paris") v. France*, 23 July 2009. The Court attached particular importance to the fact that the photographs published had been derived from advertising material, which set this case apart from cases in which the photographs in issue had been obtained through contentious or undercover methods or had interfered with the privacy of the persons concerned. The previous disclosure by Johnny Hallyday himself (in his autobiography) of the relevant information about the lavish way in which he managed and spent his money was also an essential element of the Court's analysis. The singer's disclosures weakened the degree of protection to which he was entitled as regards his private life. That decisive factor should have been taken into account by the French courts in their assessment of the publishing company's liability, but this had not been the case. Lastly, although the article might have appeared negative towards Johnny Hallyday, it did not contain any offensive expressions or harmful intent towards him.

which by itself is an indication of the somewhat weak enforcement instruments of the Convention and of the very different levels of development of democracy and respect for human rights in the Convention's member states. During the last ten years, Turkey, one of the 13 founding States of the Convention in 1950[28], has been found over and over again in breach with the right to freedom of (political) expression[29]. The situation in terms of freedom of expression and information is also very problematic in some of the "new" member states, especially in Russia, Georgia, Armenia, Moldova, Azerbaijan and Ukraine. Disrespect for freedom of expression and information and press freedom in these countries goes hand in hand with violations of other fundamental human rights and freedoms. On the other hand, the countries with a high level of press freedom, as shown in the international ratings of *Reporters without Borders (RSF)* or *Freedom House*[30], are countries in which democracy, transparency, respect for human rights and the rule of law is strongly rooted, institutionalised and integrated in society. In the top 20 of the 2008 press freedom ranking by *RSF* are only European states, apart from New Zealand and Canada. On top of the list are traditionally all Nordic countries (Iceland, Norway, Sweden, Denmark and Finland) and some West-European countries (the Netherlands, Ireland, Belgium, Luxembourg, Portugal, Switzerland, Germany). Since a few years also all the Baltic states (Estonia, Latvia and Lithuania), together with the Czech Republic and Slovakia, have succeeded to take their place in the top 20. All member states of the European Convention are in the top 40 of the *RSF*-ranking, except Italy (on 44) and Turkey (on 102) and states formerly belonging or connected to the Soviet-Union or the former Republic of Yugoslavia, such as Macedonia (42), Poland (45), Croatia (47), Romania (47), Montenegro (53), Bulgaria (59), Serbia (64), Albania (79), Ukraine (87), Moldova (98), and Armenia (102). The most negative rankings of European Convention member states are for Georgia (120), Russia (141), and Azerbaijan (150).[31]

3. SOME GENERAL CHARACTERISTICS AND BASIC PRINCIPLES OF THE EUROPEAN COURT'S CASE LAW

3.1. The Court's supervisory role

The European Court of Human Rights has developed over the years a substantial case law in which it has expressed and clarified some basic principles which inherently influence the impact of Article 10 of the Convention. The Court has also elaborated a framework of guiding principles in order to apply its ***supervisory role*** essentially regarding the necessity of an interference in the right to freedom of expression: "*The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an*

[27] In about 350 cases the Court found a violation of Article 10. It is to be underlined however that only a minority of the applications introduced in Strasbourg lead to a final judgment by the European Court, as most applications were considered, by a Committee of three judges or by the Court, not admissible for diverse reasons, e.g. for not fulfilling the condition of exhaustion of all (relevant) domestic remedies, for the lack of status as a 'victim', for not applying within a period of six months or because the application is considered manifestly ill-founded (Art. 35 Convention). For an interesting example, see ECtHR (Decision), 23 June 2003, Case No. 65831/01, *R. Garaudy v. France* (denial of holocaust excluded from protection of Article 10, in application of Article 17 of the Convention - *Prohibition of abuse of rights*) and ECtHR (Decision), 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark* (compelling order to hand over unedited footages, interference is proportionate to the legitimate aim pursued and the reasons given by the Danish Supreme Court in justification of those measures were relevant and sufficient, application manifestly ill-founded within the meaning of Article 35 § 3 of the Convention).

[28] The 13 European States undersigning in 1950 the European Convention of Human Rights and Fundamental Freedoms were Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Turkey and the United Kingdom.

[29] In more than 120 cases the Court has found a violation of freedom of expression by the Turkish authorities. In a few cases the Turkish government negotiated a friendly settlement, recognising however that Turkish law and practice urgently needed to be brought into line with the Convention's requirements under Article 10 of the Convention. The procedure for EU-membership of Turkey meanwhile has proved to have (some) positive influences and to increase the respect for human rights in general and specifically freedom of political expression in Turkey.

[30] See <www.rsf.org> and <www.freedomhouse.org>.

[31] At the very bottom of the ranking, from position 150 onwards, are countries with no or no sufficient institutionalised democratic systems, showing a general lack of respect for human rights, with gross violations of freedom of (political/artistic) expression and massive disrespect for journalistic rights, media freedom and citizens' right to freedom of expression and access to information. The situation from this perspective is highly problematic in Zimbabwe, Belarus, Yemen, Iraq, Syria, Libya, Saudi-Arabia, Iran, China, Vietnam, Cuba, Burma, North-Korea, and finally Eritrea at place 173.

independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10". The Court has also made clear that its "*task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole*". The Court essentially must determine whether the reasons adduced by the national authorities to justify the interference were *"relevant and sufficient"* and whether the measure taken was *"proportionate to the legitimate aims pursued"*.[32]

The Court's task in exercising its supervisory function is to review under Article 10, "*in the light of the case as a whole*", the decisions the domestic authorities have taken pursuant to their power of appreciation. In its essence, the Court has to satisfy itself that the national authorities applied standards which are in conformity with the principles embodied in Article 10 of the Convention, and moreover, that they have based their decisions on an ***acceptable assessment of the relevant facts***. The Court also controls whether it has been demonstrated that ***effective and adequate safeguards and procedural guarantees, such as a judicial review,*** were available in order to enhance the right to freedom of expression.[33]

The Court looks at a set of different aspects of a case before deciding whether or not an interference in the right to freedom of expression of the applicant(s) is necessary in a democratic society. This "***contextualisation***" of its law-finding implies that the Court focuses on the case in its different aspects, "*in the light of the case as a whole*". To this end the Court will take into account ***who*** is invoking the right to freedom of expression, ***what*** was published, broadcasted or imparted, ***who*** was eventually criticised or insulted, ***how*** the opinions or statements were formulated or what medium was used, ***to whom*** the message was directed or who could receive the information, ***when*** something was published, broadcasted or imparted, ***where*** and under ***which circumstances*** something was made public, with what ***intention*** information was made public or allegations or opinions were formulated, and what the possible ***effect*** or impact of the message was. The Court finally will also take into account the character of the interference or the severity or ***proportionality*** of the sanctions, before finally deciding whether or not an interference with the right to freedom of expression amounted to a violation of Article 10 of the Convention.

Freedom of expression and information and interferences by public authorities "in the light of the case as whole": relevant aspects of the contextual setting

1.- who
2.- what
3.- about whom
4.- how
5.- to whom
6.- when
7.- where
8.- under which circumstances
9.- with what intention
10.- with what (possible) effect
11.- and what are the characteristics of the interference in terms of proportionality

Of crucial importance while evaluating a case in its context is the approach by the Court applying *a very broad interpretation of the scope of freedom of expression and information*, together with a large acceptance of what can be considered an "interference" in this right, from prior restraint and custodial sentences to a suspended sanction, a mild award of damages, an order to publish a rectification or an admonishment. Even a lack of intervention by public authorities can be considered a breach of Article 10 of the Convention. This approach has established that the right to freedom of expression enshrined in Article 10 § 1

[32] These general principles are reiterated or reformulated in many judgments of the European Court. For some recent examples, seECIt e e.g. ECtHR (Grand Chamber), *Lindon, Otchakovsky-Laurens and July v. France*, 22 October 2007; ECtHR (Grand Chamber), *Stoll v. Switzerland*, 10 December 2007; ECtHR, *Sanoma Uitgevers BV v. the Netherlands*, 31 March 2009; ECtHR, *Bodrozic and Vuijn v. Serbia*, 23 June 2009 and ECtHR, *Féret v. Belgium*, 16 July 2009.

[33] ECtHR, *Çetin a.o. v. Turkey*, 13 February 2003; ECtHR, *Steel and Morris v. U.K.,* 15 February 2005; ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005; ECtHR, *Independent News and Media and Independent Newspapers Limited v. Ireland*, 16 June 2005; ECtHR, *Mehmet Emin Yildiz a.o. v. Turkey*, 11 April 2006; ECtHR, *Raichinov v. Bulgaria*, 20 April 2006 and ECtHR, *Saygili and Seyman v. Turkey*, 14 June 2006. See also ECtHR, *Tolstoy Miloslavsky v. U.K.*, 13 July 1995; ECtHR, *Association Ekin v. France*, 17 July 2001; ECtHR, *Gaweda v. Poland*, 14 March 2002; ECtHR, *Peev v. Bulgaria*, 26 July 2007; ECtHR, *Glas Nadezhda Eood & Elenkov v. Bulgaria*, 11 October 2007; ECtHR, *Meltex Ltd. and Mesrop Movsesyan v. Armenia*, 17 June 2008; ECtHR, *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009 and ECtHR, *Kenedi v. Hungary*, 26 May 2009.

is protected under a very large umbrella, including all kinds of expressions, information and opinions, regardless the source or medium, regardless the aim, regardless the persons involved, and covering all aspects of the communication process, in terms of expressing, imparting and receiving[34] information and opinions. On the other hand the Court has made clear that the possibility of restrictions or other interferences in the right to freedom of expression and information must be narrowly interpreted and the need of any restriction or sanction must be convincingly, pertinently justified as a "pressing social need" in a democratic society. It is this combination of broadening the scope of application of the right to freedom of expression and information and *narrowing down the possible restrictions and interferences* by public authorities and private organisations that characterises the approach and the commitment of the European Court of Human Rights in guaranteeing and upgrading freedom of expression in Europe's democracies.

It is important to notice that, according to the Strasbourg Court's case law, national authorities should not only abstain from interferences in freedom of expression and press freedom that are not necessary in a democratic society. The state has also ***positive obligations to protect the right of freedom of expression*** against interferences by private persons or corporate organisations. The Court has emphasized that "*in addition to the primary negative undertaking of a State to abstain from interferences in Convention guarantees, there may be positive obligations inherent in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligations (..)*".[35] In the case of *Özgür Gündem v. Turkey* the Court developed this approach by claiming that "*genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals*". After a campaign that involved killings, disappearances, injuries, prosecutions, seizures and confiscation, the newspaper *Özgür Gündem* had ceased publication. According to the European Court, the Turkish authorities had failed to comply with their positive obligation to protect the newspaper and its journalists in the exercise of their freedom of expression.[36] In a case against Sweden the Court made clear that although its task is not to settle disputes of a purely private nature, "*it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention*".[37]

In some areas the Court accepts although a broad ***margin of appreciation*** by the member states, such as in matters of positive obligations by member states[38], in cases where interferences are based on the protection of morals[39], regarding restrictions on commercial speech[40] and regarding the assessment of damages in libel or defamation cases[41], although in each of these areas the Court has also found violations of Article 10.[42] The margin of appreciation for the member states is definitely more narrow and there is little scope under Article 10 of the Convention for restrictions on freedom of expression in the area of political speech or debate on matters of public interest. In the

[34] On the right to receive information, see ECtHR, *Autronic v. Switzerland*, 22 May 1990; ECtHR, *Open Door and Dublin Well Women v. Ireland*, 29 October 1992; ECtHR, *Khursid Mustafa and Tarzibachi v. Sweden*, 16 December 2008; ECtHR, *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009 and ECtHR, *Kenedi v. Hungary*, 26 May 2009.

[35] ECtHR, *Fuentes Bobo v. Spain*, 29 February 2000; ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000; ECtHR, *VGT Verein gegen Tierfabriken v. Switzerland*, 28 June 2001; ECtHR, *VGT Verein gegen Tierfabriken (n° 2) v. Switzerland*, 4 October 2007; ECtHR (Grand Chamber), *VGT Verein gegen Tierfabriken (n° 2) v. Switzerland*, 30 June 2009 and ECtHR, *Wojtas-Kaleta v. Poland*, 16 July 2009. See also ECtHR, *Appleby a.o. v. U.K.*, 6 May 2003.

[36] ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000.

[37] ECtHR, *Khursid Mustafa and Tarzibachi v. Sweden*, 16 December 2008.

[38] ECtHR, *Appleby a.o. v. U.K.*, 6 May 2003.

[39] ECtHR, *Handyside v. U.K.,* 7 December 1976; ECtHR, *Müller a.o. v. Switzerland,* 24 May 1988; ECtHR, *Otto-Preminger-Institut v. Austria*, 20 September 1994; ECtHR, *Wingrove v. U.K.*, 25 November 1996 and ECtHR, *I.A. v. Turkey*, 13 September 2005. See also ECtHR, *Murphy v. Ireland*, 10 July 2003.

[40] ECtHR, *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989; ECtHR, *Casado Coca v. Spain*, 24 February 1994; ECtHR, *Demuth v. Switzerland*, 5 November 2002; ECtHR, *Société de Conception de Presse et d'Edition and Ponson v. France*, 5 March 2009 and ECtHR, *Hachette Filipacchi Presse Automobile and Dupuy v. France*, 5 March 2009. See also ECtHR, *Murphy v. Ireland*, 10 July 2003.

[41] ECtHR, *Independent News and Media and Independent Newspapers Limited v. Ireland,* 16 June 2005.

[42] ECtHR, *Gündüz v. Turkey*, 4 December 2003; ECtHR, *Giniewski v. France*, 31 January 2006; ECtHR, *Aydin Tatlav v. Turkey*, 2 May 2006; ECtHR, *Stambuk v. Germany,* 17 October 2002; ECtHR, *VGT Verein gegen Tierfabriken (n° 1) v. Switzerland*, 28 June 2001; ECtHR, *Fuentes Bobo v. Spain*, 29 February 2000; ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000; ECtHR, *VGT Verein gegen Tierfabriken (n° 2) v. Switzerland*, 4 October 2007. See also ECtHR, *Tolstoy Miloslavsky v. U.K.*, 13 July 1995.

terms of the Court itself "*the most careful scrutiny on the part of the Court is called for when, (..), the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern*".[43]

A striking example of the impact of the Court's case law is the case of *TV Vest and Rogaland Pensjonistparti v. Norway* in which the Court was not persuaded that the application of a ban on paid political advertising had the desired effect. In a remarkable judgment the Court explicitly rejected the view expounded by the Norwegian Government that there was no viable alternative to a blanket ban.[44] The European Court said to accept that the lack of consensus in Europe regarding the necessity to ban political advertisements on TV spoke in favour of granting States greater discretion than would normally be allowed in decisions with regard to restrictions on political debate. The Court however came to the conclusion that the arguments in support of the prohibition of paid political advertising on television in Norway, such as the safeguarding of the quality of political debate, guaranteeing pluralism, maintaining the independence of broadcasters from political parties and preventing powerful financial groups from taking advantage having access to commercial political advertisements on TV, were relevant but not sufficient reasons to justify, in the specific circumstances of the case, the total prohibition of this form of political advertising. Accordingly, in the Court's view, there had been a violation of Article 10 of the Convention.[45] It is obvious that the Court's judgment has initiated or renewed the debate in many countries in Europe whether or not a ban on political advertising on television is still a legitimate restriction on freedom of political speech and access to paid political advertising. Due to the judgment in the case against Norway, some countries have already modified or are reviewing their legislation on this topic.[46]

3.2. Freedom of expression, public debate and defamation of politicians or public figures

One of the main characteristics of the Court's case law over the years is the emphasis on the freedom of political debate and critical information regarding politics and politicians. The Court has recognised that there are *wider limits of acceptable criticism as regards a politician or a public figure* as such, than as regards a private individual. In several judgments, the Court has reiterated that a politician "*inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance*".[47] The Court went a step further regarding public debate and criticism about *governments and executive bodies*, as "*the limits of permissible criticism are wider with regard to a government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to libel proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media*".[48] Members of parliament, local politicians, governments, public authorities or public figures in general have to accept even sharp criticism, sometimes expressed in a harsh or hostile tone.[49] Journalists themselves however must also accept to be criticised in a polemical tone, e.g. by other journalists or by politicians[50]. Also police officers, members of the military, public prosecutors and even judges can be sharply criticised under the

[43] See e.g. ECtHR, *Jersild v. Denmark*, 23 September 1994; ECtHR, *Bladet Tromsø and Stensaas v. Norway,* 20 May 1999; ECtHR, *Colombani a.o. v. France*, 25 June 2002; ECtHR, *TV Vest and Rogaland Pensjonistparti v. Norway*, 11 December 2008 and ECtHR, *Kudeshkina v. Russia*, 26 February 2009. The protection of political speech in parliament is considered to be absolute: ECtHR, *A. v. U.K.,* 17 December 2002, while the politician's freedom of expression outside parliament is to be balanced with Article 6 and/or Article 8 of the Convention: ECtHR, *Cordova (n° 1 and 2) v. Italy*, 30 January 2003 and ECtHR, *G.C.I.L. and Cofferati v. Italy*, 24 February 2009. See also ECtHR, *Jerusalem v. Austria*, 27 February 2001.

[44] ECtHR, *TV Vest and Rogaland Pensjonistparti v. Norway*, 11 December 2008.

[45] Compare with ECtHR, *Murphy v. Ireland*, 10 July 2003, where the Court found a ban on religious advertising on television in accordance with Article 10 of the Convention. The Court considered that religious advertising on television would lean in favour of unbalanced usage by religious groups with larger resources. It accepted a total ban on religious advertising on television in Ireland, referring to the country-specific religious sensitivities. For the Court it is important that the applicant, a pastor attached to the Irish Faith Centre, a bible based Christian ministry in Dublin, kept to be free to advertise in any of the print media or to participate as any other citizen in programmes on religious matters and to have services of his church broadcast in the audiovisual media.

[46] See also T. Lewis, "Reasserting the Primacy of Broadcast Political Speech after Animal Defenders International? - Rogaland Pensioners Party v. Norway", 1 *Journal of Media Law* (2009), p. 37-48.

[47] ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005.

[48] See e.g. ECtHR, *Dyuldin and Kislov v. Russia*, 26 July 2007.

protection of Article 10 of the Convention.[51] On many occasions the Court emphasized *the essential function the press fulfils in a democratic society*, and it even mentioned "the duty" of the press to impart, in a manner consistent with its obligations and responsibilities, *information and ideas on all matters of public interest*.[52] According to the Court, "*journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation*". The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is however subject to the proviso that "*they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism*".[53] The *satirical character* of a text or a cartoon and the irony underlying it are also to be taken into account.[54]

The European Court has also showed to stand up for other basic democratic values in a democracy to be reflected in freedom of expression, such as e.g. ***gender equality.*** In one of its latest judgments (*Bodrozic and Vuijn v. Serbia*) the Court made clear to the Serbian authorities that comparing an adult man to a blonde woman is not *ipso facto* defamatory or insulting. The Court is struck by the argument "*of the domestic courts in this connection, as later endorsed by the Government, that comparing an adult man to a blonde woman constituted an attack on the integrity and dignity of men. Moreover, the domestic authorities considered such a comparison objectively insulting within their society. However, the Court finds that argument derisory and unacceptable*".[55]

3.3. The right of privacy: also for politicians?

The Court at several occasions observed that private individuals and to some extent also public persons have a legitimate expectation of protection of and respect for their *private life* and that

[49] ECtHR, *Lingens v. Austria*, 8 July 1986; ECtHR, *Castells v. Spain*, 23 April 1992; ECtHR, *Schwabe v. Austria*, 28 August 1992; ECtHR, *Oberschlick (n° 2) v. Austria*, 1 July 1997; ECtHR, *Öztürk v. Turkey*, 28 September 1999; ECtHR, *Dalban v. Romania*, 28 September 1999; ECtHR, *Wille v. Liechtenstein*, 28 October 1999; ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000; ECtHR, *Erdogdu v. Turkey*, 15 June 2000; ECtHR, *Lopes Gomes da Silva v. Portugal*, 3 October 2000; ECtHR, *Jerusalem v. Austria*, 27 February 2001; ECtHR, *Feldek v. Slovakia*, 12 July 2001; ECtHR, *E.K. v. Turkey*, 7 February 2002; ECtHR, *Dichand a.o. v. Austria*, 26 February 2002; ECtHR, *Colombani a.o. v. France*, 25 June 2002; ECtHR, *Çetin v. Turkey*, 13 February 2003; ECtHR, *C.S.Y. v. Turkey*, 4 March 2004; ECtHR, *Vides Aizsardzības Klubs v. Latvia*, 27 May 2004; ECtHR, *Karhuvaara and Iltalethi v. Finland*, 16 November 2004; ECtHR, *Sokolowski v. Poland*, 29 March 2005; ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005; ECtHR, *Grinberg v. Russia*, 27 July 2005; ECtHR, *Wirtschafts-Trend Zeitschriften-Verlags Gmbh v. Austria*, 27 October 2005; ECtHR, *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. (n° 3) v. Austria*, 13 December 2005; ECtHR, *Malisiewicz-Gąsior v. Poland,* 6 April 2006; ECtHR, *Brasilier v. France*, 11 April 2006; ECtHR, *Rosiero Bento v. Portugal*, 18 April 2006; ECtHR, *Lyashko v. Ukraine*, 10 August 2006; ECtHR, *Monnat v. Switzerland*, 21 September 2006; ECtHR, *Mamère v. France*, 7 November 2006; ECtHR, *Radio Twist v. Slovakia*, 19 December 2006; ECtHR, *Tønsbergs Blad AS and Haukom v. Norway*, 1 March 2007; ECtHR, *Lombardo v. Malta*, 24 April 2007; ECtHR, *Colaço Mestre and Sociedado Independente de Communicacão (SIC) v. Portugal*, 26 April 2007; ECtHR, *Goreleshvili v. Georgia*, 5 June 2007; ECtHR, *Flux (n° 3) v. Moldova*, 12 June 2007; ECtHR, *Artun and Güvener v. Turkey*, 26 June 2007; ECtHR, *Lionarakis v. Greece*, 5 July 2007; ECtHR, *A.S. Diena and Ozoliņš v. Latvia,* 12 July 2007; ECtHR, *Dyuldin and Kislov v. Russia*, 26 July 2007; ECtHR, *Kita v. Poland*, 8 July 2008; ECtHR, *Riolo v. Italy*, 17 July 2008; ECtHR, *Dlugolęcki v. Poland*, 24 February 2009 and ECtHR, *Kydonis v. Greece*, 2 April 2009.

[50] ECtHR, *Urbino Rodrigues v. Portugal*, 29 November 2005 and ECtHR, *Sanocki v. Poland*, 17 July 2007. See however also ECtHR, *Andreas Wabl v. Austria,* 21 March 2000.

[51] ECtHR, *Thorgeir Thorgeirson v. Iceland*, 25 June 1992; ECtHR, *De Haes and Gijsels v. Belgium*, 24 February 1997; ECtHR, *Hrico v. Slovakia*, 20 July 2004; ECtHR, *Sabou and Pîrcălab v. Romania*, 28 September 2004; ECtHR, *Amihalachioaie v. Moldova*, 20 April 2004; ECtHR, *Saviţchi v. Moldova*, 11 October 2005; ECtHR (Grote Kamer), *Kyprianou v. Cyprus*, 15 December 2005; ECtHR, *Raichinov v. Bulgaria*, 20 April 2006; ECtHR, *Peev v. Bulgaria*, 26 June 2007; ECtHR, *Ormanni v. Italy*, 17 July 2007; ECtHR, *Saygılı, Bilgiç and Kurtay v. Turkey,* 8 January 2008; ECtHR, *July and SARL Libération v. France*, 14 February 2008; ECtHR, *Flux (n° 5) v. Moldova*, 1 July 2008 and ECtHR, *Obukhova v. Russia*, 8 January 2009. Compare with ECtHR, *Barfod v. Denmark*, 22 February 1989; ECtHR, *Prager and Oberschlick* v. Austria, 26 April 1995; ECtHR (Grand Chamber), *Perna v. Italy*, 6 May 2003; ECtHR, 30 March *2006, Saday v. Turkey*; ECtHR, *Kobenter and Standard Verlags GmbH v. Austria*, 2 November 2006; ECtHR, *Leempoel and S.A. Ciné Revue v. Belgium*, 9 November 2006; ECtHR (Grand Chamber), *Cumpănă and Mazăre v. Romania*, 17 December 2004 and ECtHR (Grand Chamber), *Pedersen and Baadsgaard v. Denmark*, 17 December 2004.

[52] Although it is not obvious how this "duty" can be legally enforced.

[53] ECtHR, *Fressoz and Roire v. France*, 21 January 1999; ECtHR, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999; ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005; ECtHR, *Monnat v. Switzerland*, 21 September 2006. See also ECtHR (Grand Chamber), *Stoll v. Switzerland*, 10 December 2007.

[54] ECtHR, *Sokolowski v. Poland*, 29 March 2005; ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005; ECtHR, *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. (n° 3) v. Austria,* 13 December 2005; ECtHR, *Alinak v. Turkey*, 4 May 2006; ECtHR, *Klein v. Slovakije*, 31 October 2006; ECtHR, *Nikowitz and Verlagsgruppe News GmbH* v. Austria, 22 February 2007; ECtHR, *A.S. Diena and Ozoliņš v. Latvia*, 12 July 2007 and ECtHR, *Cihan Öztürk v. Turkey*, 9 June 2009. See also ECtHR, *Freiheitliche Landesgruppe Burgenland v. Austria*, 18 July 2002 and ECtHR, *Vereinigung Bildender Künstler v. Austria*, 25 January 2007.

[55] ECtHR, *Bodrozic and Vuijn v. Serbia,* 23 June 2009.

they may legitimately expect to be protected against intrusion of their privacy or against the propagation of unfounded rumours relating to intimate aspects of their private life.[56] Freedom of the press does not extend to idle gossip about intimate or extra-marital relations merely serving to satisfy the curiosity of a certain readership and not contributing to any public debate in which the press has to fulfil its role of "public watchdog".[57] As the Court has accepted that also the *personal reputation* and the name, image or picture of individuals, including public figures, are part of private life as protected under Article 8 of the Convention[58], the balancing between *the right of privacy (Article 8)* and the right to freedom of expression (Article 10) became a difficult exercise, highly debated, also within the European Court.[59] The Court has more recently clarified that the inherent logic of Article 10 precludes the possibility of conflict with Article 8.[60] In the Court's view, the expression "the rights of others" mentioned in Article 10 (2) encompasses the right to personal integrity and serves as a ground for limitation of freedom of expression in so far as the interference designed to protect private life is proportionate. A critical statement or a negative opinion about a politician, regarding facts and behaviour in relation to his public activities, made during an election campaign in which he was a candidate, is not considered to have an impact on the private life of the person concerned. In such circumstances the Court is of the opinion that the alleged harm of the reputation as a politician is not a sustainable claim regarding the protection of the right to respect for personal integrity under Article 8 of the Convention. A limitation on freedom of expression for the sake of a politician would in such a context be disproportionate under Article 10 of the Convention.[61] The Court has accepted that it can reasonably be regarded as justified under the Convention to give more weight to the freedom of the press to impart information of public concern than a politician's of public figure's interest in protecting his or her private life and correspondence. [62] The Court has also clarified that liability for insult or defamation of governments, institutions or other state bodies is difficult to reconcile with the right to freedom of expression: "*a fundamental requirement of the law of defamation is that in order to give rise to a cause of action the defamatory statement must refer to a particular person. If all State officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be inundated with lawsuits. Not only would that result in an excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation, it would also inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog*".[63]

[56] ECtHR, *Tammer v. Estonia*, 6 February 2001; ECtHR, *Peck v. U.K.*, 28 January 2003; ECtHR, *Von Hannover v. Germany,* 26 April 2004; ECtHR, *Gourguénidzé v. Georgia,* 17 October 2006; ECtHR, *Leempoel and S.A. Ciné Revue v. Belgium*, 9 November 2006; ECtHR, *A. v. Norway*, 9 April 2009; ECtHR, *Egeland and Hanseid v. Norway*, 16 April 2009 and ECtHR, *Standard Verlags GmbH (n° 2) v. Austria*, 4 June 2009. Compare with ECtHR, *White v. Sweden*, 19 September 2006; ECtHR, *Eerikäinen a.o. v. Finland*, 10 February 2009 and ECtHR, *Karakó v. Hungary*, 28 April 2009. See also ECtHR, *Peck v. U.K.,* 28 January 2003; ECtHR, *Armonas v. Lithuania,* 25 November 2008 and ECtHR, *Biriuk v. Lithuania,* 25 November 2008.

[57] ECtHR, *Standard Verlags GmbH (n° 2) v. Austria*, 4 June 2009. See however the dissenting opinion in this case arguing that the state of marriage of a head of state can be regarded as a topic of public interest, that the rumours concerning the presidential couple's marriage that were circulated were of some relevance and that all by all the impugned text remained within the limits of acceptable comment in a democratic society.

[58] According to the Court, "private life" extends to aspects relating to personal identity, such as a person's name or picture, and furthermore includes a person's physical and psychological integrity. The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life": ECtHR, *Von Hannover v. Germany*, 26 April 2004 and ECtHR, *Pfeifer v. Austria*, 15 November 2007.

[59] ECtHR, *Radio France v. France*, 30 March 2004; ECtHR, *Von Hannover v. Germany*, 26 April 2004; ECtHR, *White v. Sweden*, 19 September 2006; ECtHR, *Gourgénidzé v. Georgia*, 17 October 2006; ECtHR, *Krone Verlags GMBH & CO KG. (n° 4) v. Austria*, 9 November 2006; ECtHR, *Shabanov and Tren v. Russia*, 14 December 2006; ECtHR (Grand Chamber), *Lindon, Otchakovsky-Laurens and July v. France*, 22 October 2007; ECtHR, *Pfeifer v. Austria*, 15 November 2007; ECtHR, *Petrina v. Romania*, 14 October 2008; ECtHR, *Armonas v. Lithuania*, 25 November 2008; ECtHR, *Biriuk v. Lithunia*, 25 November 2008; ECtHR, *A. v. Norway,* 9 April 2009; ECtHR, *Egeland and Hanseid v. Norway*, 16 April 2009 and ECtHR, *Standard Verlags GmbH (n° 2) v. Austria*, 4 June 2009. Compare with ECtHR, *Eerikäinen a.o. v. Finland*, 10 February 2009 and ECtHR, *Karakó v. Hungary*, 28 April 2009.

[60] For a thorough analysis on conflicts between human rights, including freedom of expression and the right of privacy, see E. Brems (ed.), *Conflicts Between Fundamental Rights* (Antwerp, Oxford, Portland, Intersentia, 2008).

[61] ECtHR, *Karakó v. Hungary*, 28 April 2009.

[62] ECtHR (Decision), 16 June 2009, Case No. 38079/06, *Jonina Benediktsdóttir v. Iceland*. See also ECtHR *Fressoz and Roire v. France*, 21 January 1999 and ECtHR, *Radio Twist S.A. v. Slovakia*, 19 December 2006.

[63] ECtHR, *Dyuldin and Kislov v. Russia*, 31 July 2007.

3.4. Media, NGOs and civil society as 'public watchdog'

The European Court has made clear that in a democratic society, apart from the press, also *NGOs, campaign groups or organisations with a message outside the mainstream* must be able to carry on their activities effectively and be able to rely on a high level of freedom of expression, as there is *"a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment"*.[64] In a democratic society public authorities are to be exposed to *permanent scrutiny by citizens* and everyone has to be able to draw the public's attention to situations that they consider unlawful.[65] The Court has also argued that freedom of expression is or particular importance for persons belonging to *minorities*.[66]

A particular attention is paid to the public interest involved in the ***disclosure of information***, contributing to debate on matters of public interest: "*In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence*".[67] In such circumstances a journalist, a civil servant, an activist or a staff member of an NGO should not be prosecuted or sanctioned because of breach of confidentiality or the use of illegally obtained documents.[68] The Court has accepted that the interest in protecting the publication of information originating from a source who had obtained and retransmitted the information unlawfully may in certain circumstances outweigh those of an individual or an entity, private or public, in maintaining their confidentiality. A newspaper that has published illegally gathered emails between two public figures, directly related to a public discussion on a matter of serious public concern, can be shielded by Article 10 of the Convention against claims based on the right of privacy as protected under Article 8 of the Convention.[69]

In its Grand Chamber judgment in *Stoll v. Switzerland*, the Court confirms that "*press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as "public watchdog" and the ability of the press to provide accurate and reliable information may be adversely affected.*[70] In cases in which journalists reported about confidential information in a sensationalist way[71] or in which the revealed documents did not concretely or effectively contribute to public debate or only concerned information about the private life of the persons concerned[72], the Court accepted the (proportionate) interferences in their freedom of expression.

In the Grand Chamber judgment in *Guja v. Moldova*, the Court recognised the need of ***protection of whistleblowers*** by Article 10 of the Convention. The Court noted "*that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or*

[64] ECtHR, *Steel and Morris v. U.K.*, 15 February 2005. See also ECtHR, *Hertel v. Switzerland*, 25 Augustus 1998; ECtHR, *VGT Verein gegen Tierfabriken (n° 1) v. Switzerland*, 28 June 2001; ECtHR, *VGT Verein gegen Tierfabriken (n° 2) v. Switzerland*, 4 October 2007; ECtHR, *Vides Aizsardzības Klubs (VAK) v. Latvia*, 27 May 2004 and ECtHR, *Mamère v. France*, 7 November 2006. See also ECtHR, *Open Door and Dublin Well Women v. Ireland*, 29 October 1992; ECtHR, *Hashman and Harrup v. U.K.* 25 November 1999; ECtHR, *Çetin and Şakar v. Turkey*, 20 September 2007 and ECtHR, *Women on Waves v. Portugal*, 3 February 2009.

[65] ECtHR, *Vides Aizsardzības Klubs (VAK) v. Latvia*, 27 May 2004.

[66] ECtHR, *Gorzelik v. Poland*, 17 February 2004.

[67] ECtHR (Grand Chamber), *Guja v. Moldova*, 12 February 2008.

[68] ECtHR, *Fressoz and Roire v. France*, 21 January 1999; ECtHR, *Dammann v. Switzerland*, 25 April 2006; ECtHR, *Dupuis a.o. v. France*, 7 June 2007; ECtHR, *Peev v. Bulgaria*, 26 July 2007 and ECtHR (Grand Chamber), *Guja v. Moldova*, 12 February 2008. See also ECtHR, *Radio Twist S.A. v. Slovakia*, 19 December 2006.

[69] ECtHR (Decision), 16 June 2009, Case No. 38079/06, *Jonina Benediktsdóttir v. Iceland*. See also ECtHR *Fressoz and Roire v. France*, 21 January 1999 and ECtHR, *Radio Twist S.A. v. Slovakia*, 19 December 2006.

[70] ECtHR (Grand Chamber), *Stoll v. Switzerland*, 10 December 2007. See also ECtHR, *Goodwin v. United Kingdom*, 27 March 1996 and ECtHR, *Fressoz and Roire v. France,* 21 January 1999.

[71] ECtHR (Grand Chamber), *Stoll v. Switzerland*, 10 December 2007.

[72] ECtHR, *Leempoel and SA Ciné Revue v. Belgium*, 9 November 2006 and ECtHR, *Marin v. Romania,* 3 February 2009. See also ECtHR, *De Diego Nafria v. Spain*, 14 March 2002 and ECtHR (Grand Chamber), *Cumpăn? and Mazăre v. Romania*, 17 December 2004.

wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large". Although disclosure should be made in the first place to the person's superior or other competent authority or body, the Court accepted that when such a practice is clearly impracticable, the information could, as a last resort, be disclosed to the public. The Court held that the dismissal of a civil servant for leaking two confidential letters from the public prosecutor's office to the press was in breach of Article 10 of the Convention, also referring to the ***serious chilling effect*** of the applicant's dismissal for other civil servants or employees, discouraging them from reporting any misconduct.[73]

Especially in cases where ***information is published on alleged corruption, fraud or illegal activities*** in which politicians, civil servants or public institutions are involved, journalists, publishers, media or NGOs can count on the highest standards of protection of freedom of expression.[74] The Court has emphasized that "*in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed*".[75] The Court expressed the opinion that *"the press is one of the means by which politicians and public opinion can verify that public money is spent according to the principles of accounting and not used to enrich certain individuals".*[76] Defamation laws and proceedings cannot be justified if their purpose or effect is to prevent legitimate criticism of public officials or the exposure of official wrongdoing or corruption. A right to sue in defamation for the reputation of officials could easily be abused and might prevent free and open debate on matters of public interest or scrutiny of the spending of public money.[77]

The Court's case law has also clarified that news reporting based on ***interviews,*** whether edited or not, constitutes one of the most important means by which the press is able to play its vital role of "public watchdog". Punishing a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.[78] The fact that interviews or statements are given by a member of a proscribed or illegal (terrorist) organisation cannot in itself justify a blanket ban on the exercise of freedom of expression by the media and journalists. Although a prohibition to publish or broadcast an ***interview with spokesmen of a terrorist organisation*** can be justified[79], the Court has clarified that "*regard must be had to the words used and the context in which they were published, with a view to determining*

[73] ECtHR (Grand Chamber), *Guja v. Moldova*, 12 February 2008. See also ECtHR, *Zakharov v. Russia*, 5 October 2006; ECtHR, *Peev v. Bulgaria*, 26 July 2007; ECtHR, *Kasayu v. Turkey*, 13 November 2008; ECtHR, *Ayhan Erdoğan v. Turkey*, 13 January 2009; ECtHR, *Marchenko v. Ukraine*, 19 February 2009 and ECtHR, *Kudeshkina v. Russia*, 26 February 2009.

[74] See ECtHR, *Dalban v. Romania*, 28 September 1999; ECtHR, *Thoma v. Luxembourg*, 29 March 2001; ECtHR, *Feldek v. Slovakia*, 12 July 2001; ECtHR, *Colombani a.o. v. France*, 25 June 2002; ECtHR, *Vides Aizsardzības Klubs (VAK) v. Latvia*, 27 May 2004; ECtHR, *Sabou and Pîrcălab v. Romania*, 28 September 2004; ECtHR, *Karhuvaara and Iltalethi v. Finland*, 16 November 2004; ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005; ECtHR, *Sokolowksi v. Poland*, 29 March 2005; ECtHR, *Barb v. Romania*, 7 October 2008; ECtHR, *Folea v. Romania*, 14 October 2008; ECtHR, *Kayasu v. Turkey,* 13 November 2008 and ECtHR, *Băcanu and SC 'R' SA v. Romania*, 3 March 2009. See also most Russian cases related to criticizing politicians or other public figures: ECtHR, *Grinberg v. Russia*, 27 July 2005; ECtHR, *Karman v. Russia*, 14 December 2006; ECtHR, *Krasulya v. Russia*, 22 February 2007; ECtHR, *Dyuldin and Kislov v. Russia*, 31 July 2007; ECtHR, *Chemodurov v. Russia*, 31 July 2007; ECtHR, *Dyundin v. Russia*, 14 October 2008; ECtHR, *Godlevskiy v. Russia*, 23 October 2008; ECtHR, *Kazakov v. Russia,* 18 December 2008; ECtHR, *Obukhova v. Russia*, 8 January 2009 and ECtHR, *Kudeshkina v. Russia*, 26 February 2009. For Moldova and Bulgaria, see e.g. ECtHR, *Busuioc v. Moldova*, 21 December 2004; ECtHR, *Flux (n° 3) v. Moldova*, 12 June 2007; ECtHR, *Flux (n° 2) v. Moldova*, 3 July 2007; ECtHR, *Ţara and Poiată v. Moldova*, 16 October 2007; ECtHR, *Flux and Samson v. Moldova*, 23 October 2007; ECtHR, *Flux (n° 4) v. Moldova*, 12 February 2008; ECtHR, *Flux (n° 5) v. Moldova*, 1 July 2008; ECtHR, *Raichinov v. Bulgaria*, 20 April 2006 and ECtHR, *Kandzhov v. Bulgaria*, 6 November 2008

[75] ECtHR, *Voskuil v. the Netherlands*, 22 November 2007

[76] ECtHR, *Krone Verlag GmbH & Co (nr. 5) v. Austria*, 14 November 2008.

[77] EctHR, *Cihan Öztürk v. Turkey*, 9 June 2009.

[78] ECtHR, *Jersild v. Denmark*, 23 September 1994; ECtHR, *Thoma v. Luxembourg*, 29 March 2001; ECtHR, *Savitchi v. Moldova*, 11 October 2005 and ECtHR, *Flux and Samson v. Moldova*, 23 October 2007.

[79] ECommHR, 16 April 1991, Case No. 15404/89, *Betty Purcell and Others v. Ireland*, *D&R*, 70, 262; ECommHR, 9 May 1994, Case No. 18714/91, *D. Brind and Others v. U.K.*, *D&R*, 77-A, 42 and ECommHR, 9 May 1994, Case No. 18759/91, *J.M. McLaughlin v. U.K.*, not publ. See also ECommHR, 17 May 1984, Case No. 10799/84, *Radio X., S., W. and A. v. Switzerland*, *D&R*, 37, 236. Compare with ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000 and ECtHR, *Çetin v. Turkey*, 13 February 2003.

whether the impugned text, taken as a whole, can be considered an incitement to violence (..). When a publication cannot be categorised as such, Contracting States cannot with reference to national security or territorial integrity restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media".[80] A requirement for journalists to distance themselves systematically and formally from the content of a ***quotation*** (from e.g. another newspaper or magazine) is not reconcilable with the press's role of providing information on current events, opinions and ideas.[81] Methods of balanced reporting may vary considerably and "*it is not for the Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what techniques of reporting should be adopted by journalists*".[82] Article 10 not only protects the substance, but also the ***form*** in which information or ideas are conveyed or expressed.

An interference by public authorities by means of prosecution or other judicial measures with regard to the ***journalist's research and investigative activities*** calls for the most scrupulous examination from the perspective of Article 10 of the Convention.[83] From this perspective also ***journalistic sources*** can count on a very high level of protection in terms of Article 10 of the Convention. According to the Court, "*protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the Committee of Ministers Recommendation (..). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest*".[84] ***Searches and confiscations*** of journalistic material in order to reveal the identity of an informant can hardly be justified from this perspective. The Court has considered that "*even if unproductive, a search conducted with a view to uncover a journalist's source constitutes a more serious measure than an order to divulge a source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigation powers, as, by definition, they have access to all the documentation held by the journalist*".[85] At several occasions the European Court was of the opinion that searches at media offices or at the home and place of work of journalists or reporters, amounted to a violation of Article 10 of the Convention.[86]

3.5. Opinions, value judgments and defamatory allegations

An important characteristic of the Court's case law reflects the distinction that is to be made between (defamatory) ***allegations of fact and value judgments***: "*the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10*".[87] The European Court is of the opinion that it is not, in principle, incompat-

80 ECtHR, *Demirel and Ates (n° 3) v. Turkey*, 9 December 2008. See also ECtHR, *Imza v. Turkey*, 20 January 2009.

81 ECtHR, *Thoma v. Luxembourg*, 29 March 2001 and ECtHR, *Özgür Radio-Ses Radyo-Televizyon Yayin Yapim Ve Tanitim A.Ş. (n° 3) v. Turkey*, 10 March 2009.

82 See ECtHR, *Jersild v. Denmark*, 23 September 1994; ECtHR, *Thoma v. Luxembourg*, 29 March 2001 and ECtHR, Eerikäinen a.o. v. Finland, 10 February 2009.

83 See ECtHR, *De Haes and Gijsels v. Belgium*, 24 February 1997; ECtHR, *Fressoz and Roire v. France*, 21 January 1999; ECtHR, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999; ECtHR, *Du Roy and Malaurie v. France,* 3 October 2000; ECtHR, *Thoma v. Luxembourg*, 29 March 2001; ECtHR, *Colombani a.o. v. France*, 25 June 2002; ECtHR, *Vides Aizsardzības Klubs (VAK) v. Latvia*, 27 May 2004; ECtHR, *Radio Twist S.A. v. Slovakia*, 19 December 2006; ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005 and ECtHR, *Dupuis v. France*, 7 June 2007.

84 ECtHR, *Goodwin v. U.K.*, 27 March 1996. See also ECtHR (Decision), 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark* and ECtHR, *Šečič v. Croatia*, 31 May 2007.

85 ECtHR, *Roemen and Schmit v. Luxembourg*, 23 February 2003.

86 ECtHR, *Roemen and Schmit v. Luxembourg*, 23 February 2003; ECtHR, *Ernst a.o. v. Belgium*, 15 July 2003; ECtHR, *Voskuil v. the Netherlands*, 27 November 2007 and ECtHR, *Tillack v. Belgium*, 27 November 2007. The Court however found no violation of Article 10 in ECtHR, *Sanoma Uitgevers BV v. the Netherlands*, 31 March 2009 (see <http://echrblogspot.com/2009/04/protection-of-journalists-sources.html>. In application of 43 ECHR the panel of five judges of the ECtHR on 14 September 2009 has accepted that the case will be referred to the Grand Chamber. See also Committee of Ministers of the Council of Europe, *Recommendation No. R (2000)7 on the right of journalists not to disclose their sources of information*, 8 March 2000, at <www.coe.int/t/dghl/standardsetting/media/> ; D. Banisar, *Silencing Sources. An International Survey of Protections and Threats to Journalists' Sources*, 2007, at <www.privacyinternational.org> and D. Voorhoof, "The protection of journalistic sources under fire?" in D. Voorhoof (ed.), *European Media Law. Collection of Materials 2009-2010* (Gent, Knops Publishing, 2009), p. 266-284.

ible with Article 10 to place on a defendant in libel proceedings, who wishes to rely on the defence of justification, the onus of proving to the civil standard the truth of defamatory statements.[88] Formulated in another way: "*a requirement for defendants in defamation proceedings to prove to a reasonable standard that the allegations made by them were substantially true does not, as such, contravene the Convention*".[89] A journalist, publisher or author needs however to be given the opportunity to prove the truth of his or her statement: depriving him or her of an effective opportunity to adduce evidence to support the statements and thereby attempt to establish their truthfulness or to show that their content was not entirely without foundation, constitutes a disproportionate interference with the right to freedom of expression.[90] In *Csanics v. Hungary* the Court confirmed that domestic authorities should provide effective opportunities to substantiate one's statements, even if they are to be considered "*gratuitously insulting, offensive and harsh*". According to the Court *"it would go against the very spirit of Article 10 to allow a restriction on the expression of substantiated statements solely on the basis of the manner in which they are voiced. In principle, it should be possible to make true declarations in public irrespective of their tone or negative consequences for those who are concerned by them".*[91]

In its recent case law, the Court has also applied Article 10 in the digital context and regarding libellous content on the internet.[92] In the case of *Times Newspaper Ltd. V. U.K.* the Court applied the so-called "*internet publication rule*", accepting that the British courts' finding of libel by the ***continued publication on the Internet site*** of two articles had not represented a disproportionate restriction on the newspaper's freedom of expression. The Court did not consider that the requirement to publish an appropriate qualification to the Internet version of the articles constituted a disproportionate interference with the right to freedom of expression. The Court however emphasized "*that while an aggrieved applicant must be afforded a real opportunity to vindicate his right to reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10*".[93]

In cases where journalists did not succeed to give ***reliable or relevant evidence*** for their (serious) allegations, insinuations or accusations, the Court accepts convictions and (proportionate) sanctions imposed by the national authorities as not being in breach with Article 10 of the Convention.[94] The requirement that a journalist needs to prove that the allegations made in an article were "substantially true" on the balance of probabilities, constitutes a justified restriction on the right to freedom of expression under Article 10 § 2 of the Convention.[95] In some cases the obvious lack of evidence of published allegations made

[87] See ECtHR, *Jerusalem v. Austria*, 27 February 2001; ECtHR, *Busuioc v. Moldova*, 21 December 2004; ECtHR (Grand Chamber), *Perna v. Italy,* 6 May 2003; ECtHR (Grand Chamber), *Cumpănă and Mazăre v. Romania*, 17 December 2004; ECtHR (Grand Chamber), *Pedersen and Baadsgaard v. Denmark*, 17 December 2004; ECtHR, *Ukrainian Media Group v. Ukraine*, 29 March 2005 and ECtHR, *Zakharov v. Russia*, 5 October 2006.

[88] See ECtHR, *Alithia Publishing Company Ltd. & Constantinides v. Cyprus*, 22 May 2008. See also ECtHR (Decision), 10 February 2009, Case No. 28577/05, *The Wall Street Journal Europe SPRL a.o. v. U.K.*

[89] ECtHR, *Rumyana Ivanova v. Bulgaria*, 14 February 2008.

[90] See ECtHR, *Castells v. Spain*, 23 April 1992; ECtHR, *De Haes and Gijsels v. Belgium*, 24 February 1997; ECtHR, *Flux (n° 3) v. Moldova*, 12 June 2007; ECtHR, *Flux and Samson v. Moldova*, 20 October 2007 and ECtHR, *Băcanu and SC 'R' SA v. Romania*, 3 March 2009.

[91] ECtHR, *Csánics v. Hungary*, 20 January 2009.

[92] ECtHR, *Times Newspapers Ltd (n° 1-2) v. U.K.*, 10 March 2009. For other internet-related cases, see ECtHR (Decision), 18 October 2005, Case No. 5446/03, *Perrin v. U.K.*; ECtHR, *Megadat.com SRL v. Moldova*, 8 April 2008; ECtHR (Decision), 16 September 2008, Case No. 32792/05, *Laurence Pay v. U.K.* and ECtHR, *K.U. v. Finland*, 2 December 2008.

[93] ECtHR, *Times Newspapers Ltd (n° 1-2) v. U.K.*, 10 March 2009.

[94] See ECtHR, *Prager and Oberschlick v. Austria,* 26 April 1995; ECtHR, *Constantinescu v . Romania,* 27 June 2000; ECtHR, *Mc Vicar v. United Kingdom*, 7 May 2002; ECtHR (Grand Chamber), *Perna v. Italy,* 6 May 2003; ECtHR, *Radio France v. France*, 30 March 2004; ECtHR, *Chauvy v. France*, 29 June 2004; ECtHR (Grand Chamber), *Cumpănă and Mazăre v. Romania*, 17 December 2004; ECtHR (Grand Chamber), *Pedersen and Baadsgaard v. Denmark*, 17 December 2004; ECtHR, *Busuioc v. Moldova*, 21 December 2004; ECtHR, *Stângu and Scutelnicu v. Romania*, 31 January 2006; ECtHR, *Rumyana Ivanova v. Bulgaria*, 14 February 2008; ECtHR, *Alithia Publishing Company Ltd. & Constantinides v. Cyprus*, 22 May 2008; ECtHR, *Backes v. Luxembourg*, 8 July 2008; ECtHR, *Flux (no. 6) v. Moldova*, 29 July 2008; ECtHR, *Cuc Pasco v. Romania,* 16 September 2008; ECtHR, *Petrina v. Romania*, 14 October 2008; ECtHR, *Mihaiu t. Romania*, 4 November 2008; ECtHR, *Mahmudov and Agazade v. Azerbaijan,* 18 December 2008 and ECtHR, *Brunet-Lecomte a.o. v. France*, 5 February 2009. In some cases the Court found no violation of Article 10, while it accepted that the applicant had not been guaranteed a fair trial and that there had been a violation of Article 6 § 1 of the Convention: see e.g. ECtHR, *Constantinescu v . Romania*, 27 June 2000 and ECtHR, *Mihaiu t. Romania*, 4 November 2008.

[95] ECtHR, *Mc Vicar v. U.K.,* 7 May 2002 and ECtHR (Grand Chamber), *Pedersen and Baadsgaard v. Denmark*, 17 December 2004.

the Court even decide to the (manifest) inadmissibility of a complaint under Article 10 of the Convention.[96] On the other hand, the Court has also considered that, as part of their role as a "public watchdog", the media's reporting on "*'stories' or 'rumours' - emanating from persons other than an applicant - or 'public opinion'*" is to be protected.[97] The Court at several occasions accepted that value judgments, allegations or statements only had "*a slim factual basis*" or that it was sufficient that there was "*no proof the description of events given in the articles was totally untrue*", or that the "*opinions were based on facts which have not been shown to be untrue*".[98] The Court accepts that value judgments and criticism can be based on "*unconfirmed allegations or rumours*".[99] The Court does not accept the reasoning of domestic courts that allegations of serious misconduct levelled against individuals or public persons should first have been proven in criminal proceedings.[100] Describing an act or behaviour of a politician as "illegal" is to be considered as expressing a personal legal opinion amounting to a value judgment of which the accuracy cannot be required to be proven.[101] Media applying the standards of journalistic ethics or journalists acting in consonance with the principles of "*responsible journalism*" are highly protected by Article 10 of the Convention.[102] This does not imply that in all circumstances a journalist must act in compliance with norms of good journalistic practice in order to be shielded by Article 10 of the Convention. In a recent judgment the Court was of the opinion that, although it would have been "*advisable*" for a newspaper and its journalists to have obtained comments beforehand from a person that was criticised in the newspaper for being involved in fraud and improper use of public funding, "*the mere fact that it had not done so is not sufficient to hold that the interference with the applicant company's right to freedom of expression was justified*".[103]

3.6. Public speech, arts, expressive conduct and academic speech

The high level of protection of freedom of expression for media and journalists and public debate has also been applied regarding interferences by authorities in *demonstrations, peaceful protest activities, public speeches,* or other activities contributing to debate on matters of public interest. In many cases the Court found a violation of Article 10, often in relation to Article 11 of the Convention (freedom of assembly and association).[104] The Court is of the opinion "*that one of the aims of freedom of assembly is to secure a forum for public debate and the open expression of protest. The protection of the expression of personal opinions, secured by Article 10, is one of the objectives of the freedom of peaceful assembly enshrined in Article 11*".[105] Banning, hindering or stopping a demonstration or the arrest and detention of protesters, especially when violence is used by the police, is likely to constitute a violation of Article 10 and/or Article 11 of the Convention.[106] The Court has emphasized that "*any measures interfering with the freedom of assembly and*

[96] See e.g. ECtHR (Decision), 4 April 2006, Case No. 33352/02, *László Keller v. Hongary*; ECtHR (Decision), 15 June 2006, Case No. 6928/04 and 6929/04, *Corneliu Vadim Tudor v. Romania*; ECtHR (Decision), 8 February 2007, Case No. 3540/04, *Falter Zeitschriften GmbH v. Austria*; ECtHR (Decision), 21 October 2008, Case No. 20953/06, *Tomasz Wolek, Rafal Kasprów and Jacek L?ski v. Poland* and ECtHR (Decision), 21 October 2008, Case No. 37115/06, *Vittorio Sgarbi v. Italy*. See also ECtHR (Decision), 16 October 2001, Case No. 45710/99, *Verdens Gang and Kari Aarsted Aase v. Norway* and ECtHR (Decision), 21 February 2002, Case No. 43525/98, *Gaudio v. Italy*.

[97] See e.g. ECtHR, *Thorgeir Thorgeirson v. Iceland*, 25 June 1992 and ECtHR, *Cihan Özturk v. Turkey*, 9 June 2009.

[98] See e.g. ECtHR, *Nilsen and Johnsen v. Norway*, 25 November 1999; ECtHR, *Dalban v. Romania*, 28 September 1999; ECtHR, *Dichand a.o. v. Austria*, 26 February 2002 and ECtHR, *Flux and Samson v. Moldova,* 23 October 2007.

[99] ECtHR, *Timpul Info-Magazine and Anghel v. Moldova*, 27 November 2007. See also ECtHR, *Cihan Özturk v. Turkey*, 9 June 2009. The Court in this case however also considered that "*there was a sufficient factual basis for the applicant to make a critical analysis of the situation and to raise questions about the restoration project, since the authorities had already brought criminal proceedings against the applicant for breach of duty*".

[100] See ECtHR, *Nilsen and Johnsen v. Norway*, 25 November 1999; ECtHR, *Flux (n° 6) v. Moldova,* 29 July 2008; ECtHR, *Folea v. Romania,* 14 October 2008; ECtHR, *Dyundin v. Russia,* 14 October 2008; ECtHR, *Godlevskiy v. Russia*, 23 October 2008 and ECtHR, *Kydonis v. Greece*, 2 April 2009. Compare with ECtHR, *Constantinescu v . Romania*, 27 June 2000 and ECtHR, *Petrina v. Romania,* 14 October 2008.

[101] ECtHR, *Vides Aizsardzības Klubs v. Latvia*, 27 May 2004. See also ECtHR, *Selistö v. Finland*, 16 November 2004 and *ECtHR, Karhuvaara and Iltalehti v. Finland*, 16 November 2004.

[102] ECtHR, *Flux and Samson v. Moldova,* 23 October 2007 and ECtHR, *Timpul Info-Magazine and Anghel v. Moldova*, 27 November 2007.

[103] ECtHR, *Krone Verlag GmbH & Co KG (n° 5) v. Austria*, 14 November 2008.

[104] ECtHR, *Steel a.o. v. U.K.*, 23 September 1998; ECtHR, *Hashman and Harrup v. U.K.*, 25 November 1999; ECtHR, *Patyi a.o. v. Hungary*, 7 October 2008; ECtHR, *Unay v. Turkey*, 21 October 2008; ECtHR, *Isak Tepe v. Turkey*, 21 October 2008; ECtHR, *Açik v. Turkey,* 13 January 2009; ECtHR, *Samüt Karabulut v. Turkey*, 27 January 2009 and ECtHR, *Karapete e.a. v. Turkey,* 7 April 2009.

[105] ECtHR, *Éva Molnár v. Hungary*, 7 October 2008. See also ECtHR, *Patyi a.o. v. Hungary*, 7 October 2008.

expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words used may appear to the authorities - do a disservice to democracy and often even endanger it". The Court has reiterated on several occasions that a demonstration in a public place "*inevitably causes a certain level of disruption to ordinary life, including disruption of traffic*", and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings. If not freedom of assembly "*interpreted in the light of Article 10 of the Convention*" would be deprived of all substance.[107] An expulsion order to restrict the freedom of expression and the right to take part in peaceful demonstrations or give a public speech has been considered a violation of Article 10.[108] The Court's case law shows that both expressive conduct and symbolic speech is protected. In one case the Court even considered the refusal to allow a ship with activists to enter territorial waters a breach of Article 10.[109] In another case the Court was of the opinion that the decision of a leader of a political party to wear a red star in public must be regarded as his way of expressing his political views and was not necessarily to be interpreted as "*dangerous propaganda*" for dictatorship and Communism, taking into regard the multiple meanings of the red star.[110]

Article 10 of the Convention also includes ***freedom of artistic expression*** - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation for the State not to encroach unduly on their freedom of expression.[111] The Court also recognised a high level of protection in the domain of ***academic speech*** and scientific writings or publications.[112]

3.7. No protection of 'hate speech', incitement to violence or glorification of terrorism[113]

An important area of speech the European Court is not guaranteeing a high level of protection or rather any protection at all for is ***'hate speech', including incitement to violence, holocaust denial, (neo)Nazi-propaganda***, ***incitement to discrimination*** or ***glorification of terrorism***.[114] The former European Commission of Human Rights and later the Court itself have declared applications in this regard, based on freedom of expression, manifestly ill-founded and accordingly inadmissible.[115] The Court also clarified in a few recent judgments that there can be no doubt that expressions propagating, inciting or justifying hatred based on intolerance and discrimination, do not enjoy protection of Article 10.[116] The Court has emphasised in particular "*that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" im-*

[106] ECtHR, *Patyi a.o. v. Hungary*, 7 October 2008; ECtHR, *Kandzhov v. Bulgaria*, 6 November 2008 and ECtHR, *Açik v. Turkey,* 13 January 2009.
[107] ECtHR, *Sergey Kuznetzov v. Russia,* 23 October 2008.
[108] ECtHR, *Piermont v. France,* 27 April 1995.
[109] ECtHR, *Women on Waves v. Portugal*, 3 February 2009.
[110] ECtHR, *Vajnai v. Hungary*, 8 July 2008.
[111] ECtHR, *Karatas v. Turkey*, 8 July 1999; ECtHR, *Alinak v. Turkey*, 29 March 2005 and ECtHR, *Vereinigung Bildender Künstler v. Austria*, 25 January 2007. See also ECtHR, *Müller a.o. v. Switzerland*, 24 May.
[112] ECtHR, *Hertel v. Switzerland,* 25 August 1998; ECtHR, *Wille v. Liechtenstein*, 28 October 1999; ECtHR, *Nilsen and Johnsen v. Norway*, 25 November 1999; ECtHR, *Boldea v. Romania,* 15 February 2007 and ECtHR, *Pakdemirli v. Turkey*, 22 February 2005. See also ECtHR, *Chauvy v. France*, 29 June 2004; ECtHR, *Monnat v. Switzerland*, 21 September 2006 and ECtHR, *Frankovicz v. Poland,* 16 December 2008.
[113] See also I. Hare and J. Weinstein (eds.), *Extreme Speech and Democracy* (Oxford, Oxford University Press, 2009).
[114] See A. Weber, *Manuel sur le discours de haine* (Leiden and Boston, Martinus Nijhoff Publishers, 2009).
[115] See ECommHR, 11 October 1979, Appl. nrs. 8348/78 en 8406/78, *Glimmerveen and Hagenbeek v. the Netherlands;* ECommHR, 12 May 1988, Case No. 12194/86, *Kühnen v. Germany*; ECommHR, 11 January 1995, Case No. 21128/92, *U. Walendy v. Germany*; ECommHR, 6 September 1995, Case No. 25096/94, *Otto E.F.A. Remer v. Germany*; ECommHR, 29 November 1995, Case No. 25992/94, *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v. Germany*; ECommHR, 24 June 1996, Case No. 31159/96, *P. Marais v. France* and ECtHR (Decision), 23 June 2003, Case No. 65831/01, *R. Garaudy v. France*; ECtHR (Decision), 18 May 2004, Case No. 57383/00, *Seurot v. France*; ECtHR (Decision), 16 November 2004, Case No. 23131/03, *Norwood v. U.K.;* ECtHR (Decision), 13 December 2005, Case No. 7485/03, *Witzsch v. Germany* and ECtHR (Decision), 20 February 2007, Case No. 35222/04, *Pavel Ivanov v. Russia.*
[116] ECtHR, *Soulas a.o. v. France,* 10 July 2008; ECtHR, *Balsytė-Lideikienė v. Lithuania*, 4 November 2008 and ECtHR, *Féret v. Belgium,* 16 July 2009. See also ECtHR, *Willem v. France,* 16 July 2009.

posed are proportionate to the legitimate aim pursued".[117]

Sanctions or convictions for incitement to violence or terrorism[118] or because of glorification of terrorism[119] are neither considered as violating Article 10 of the Convention. The case of *Leroy v. France* e.g. concerns the criminal conviction of a cartoonist for condoning terrorism: *'l'apologie du terrorisme'*. The Court underlined that the message of the cartoon - the destruction of US imperialism - did not amount to a denial of the fundamental values of the Convention, in contrast with incitement to racism, anti-Semitism, Holocaust negationism or Islamophobia. The Court however considered that the drawing was not limited to criticism of American imperialism, but supported and glorified the latter's violent destruction. It based its finding on the caption which accompanied the drawing, and noted that the cartoonist had expressed his moral support for those whom he presumed to be the perpetrators of the attacks of 11 September 2001. Through his choice of language, the applicant commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims. Furthermore, the cartoon had provoked a certain public reaction, capable of stirring up violence and demonstrating a plausible impact on public order, especially since the cartoon was published only a few days after the tragic event. The Court found that the measure imposed on the cartoonist had not been disproportionate to the legitimate aim pursued and that accordingly there had not been a violation of Article 10 of the Convention.[120]

Incitement to racism and the denial of holocaust in some cases have been excluded from Article 10 protection in application of Article 17 of the Convention[121], as this kind of 'hate speech' has been considered aiming at the destruction of the rights and freedoms of the Convention itself. In the case of *Lehideux and Isorni v. France* the Court in general terms made clear that "*there is no doubt, like any other remark directed against the Convention's underlying values, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10*".[122]

The Court also stated that a general and vehement attack on one ethnic group "*is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination*". Consequently, the Court found that, by reason of Article 17 of the Convention, an applicant being convicted because of incitement to hatred towards the Jewish people could not benefit from the protection afforded by Article 10 of the Convention.[123] The Court had a similar approach regarding a poster displayed at a window with a photograph of the Twin Towers in flame and the words "*Islam out of Britain – Protect the British People*". The poster also contained a symbol of a crescent and star in a prohibition sign. The Court was of the opinion that "*the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination*". Hence the applicant's display of the poster on his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Article 10.[124]

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[117] ECtHR, *Gündüz v. Turkey*, 4 December 2003. See also ECtHR, *Sürek (n° 1) v. Turkey*, 8 July 1999.

[118] ECtHR, *Zana v. Turkey*, 25 November 1997; ECtHR, *Sürek (n° 1) v. Turkey,* 8 July 1999; ECtHR, *Sürek (n° 3) v. Turkey*, 8 July 1999; ECtHR, *Hocaoğullari v. Turkey,* 7 March 2006; ECtHR, *Halis Doğan v. Turkey*, 10 October 2006; ECtHR, *Karatepe v. Turkey*, 31 July 2007 and ECtHR, *Saygili and Falakaoğlu (n° 2) v. Turkey*, 17 February 2009. See also ECtHR (Decision), 14 November 2006, Case No. 32842/02, *Medya FM Reha Radyo ve İletişim Hizmetleri S.A. v. Turkey* and ECtHR (Decision), 22 March 2007, Case No. 6250/02, *Gülcan Kaya v. Turkey.*

[119] ECtHR, *Leroy v. France,* 2 October 2008. See also ECtHR (Decision), 29 May 2007, Case No. 26870/04, *Dieter Kern v. Germany.*

[120] ECtHR, *Leroy v. France,* 2 October 2008.

[121] *I.e.* the so-called anti-totalitarian provision or abuse clause. Art. 17 provides that "*nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*". The general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention: ECtHR (Decision), 16 November 2004, Case No. 23131/03, *Norwood v. U.K.*

[122] ECtHR, *Lehideux and Isorni v. France*, 23 September 1998. The Court in this case however made no application of Article 17 and neither found a violation of Article 10, *cfr. infra.*

[123] ECtHR (Decision), 20 February 2007, Case No. 35222/04, *Pavel Ivanov v. Russia.* See also ECtHR (Decision), 23 June 2003, Case No. 65831/01, *R. Garaudy v. France*; ECtHR (Decision), 18 May 2004, Case No. 57383/00, *Seurot v. France* and ECtHR (Decision), 13 December 2005, Case No. 7485/03, *Witzsch v. Germany.*

In other cases the Court did not explicitly or directly exclude the protection of Article 10, yet found no violation of the right to freedom of expression as the interferences against some forms of 'hate speech' were considered necessary in a democratic society within the meaning of Article 10 § 2 of the Convention. The Court also has expressed the opinion that "*Article 10 should not be interpreted in such a way as to limit, derogate from or destroy the right of protection against racial discrimination under the UN Convention*".[125] In some cases the Court went a step further by stating that "*in the context of religious opinions and beliefs may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs*".[126] Although the Court has recognised on many occasions that freedom of expression is especially important for elected representatives of the people, it has also emphasised that it is crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The impact of racist and xenophobic discourse is magnified in an electoral context and to recommend solutions to immigration-related problems by advocating racial discrimination is likely to cause social tension and undermine trust in democratic institutions. In such circumstances there is a compelling social need to protect the rights of the immigrant community and to consider interferences in the right to freedom of (political) expression necessary in a democratic society.[127] In a judgment of 16 July 2009 in the case of *Willem v. France* the Court came to the conclusion that the conviction of a mayor for calling for a boycott of Israeli products was not in breach with Article 10 of the Convention. During a session of the town council and in the presence of journalists, Mr Willem had announced that he intended to call on his services to boycott Israeli products in the municipality. He stated that he had taken that decision to protest against the anti-Palestinian policies of the Israeli Government. The mayor was prosecuted and finally sentenced for provoking discrimination on national, racial and religious grounds. Like the French courts, the European Court took the view that Mr Willem had not been convicted for his political opinions but for inciting the commission of a discriminatory, and therefore punishable, act. The Court further noted that, under French law, the applicant was not entitled to take the place of the governmental authorities by declaring an embargo on products from a foreign country.[128]

In some judgments however the European Court has provided protection for racist expression[129] or statements that could be interpreted as supporting the former Nazi-regime, as the speech was related to a broader discussion on matters of public interest.[130] In the case of *Gündüz v. Turkey*, the European Court of Human Rights has also rejected the justification of a criminal conviction because of inciting the people to hatred and hostility. In this case, the applicant, in his capacity of the leader of an Islamic sect, during a TV-debate had demonstrated a profound dissatisfaction with contemporary, democratic and secular institutions in Turkey by describing them as "impious". During the programme he also openly called for the introduction of the sharia. Due to these statements Gündüz was found guilty by the state security court of incitement to hatred and hostility on the basis of a distinction founded on religion. The European Court observed that the applicant was invited to participate in the programme to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. This topic was the subject of widespread debate in the Turkish media and concerned an issue of general interest. The Court underlined that merely defending the sharia, without calling for the use of violence to establish it, cannot be regarded as "hate speech".[131] In the case of *Erbakan v. Turkey* it had not been established according to the European Court, that the 'hate speech' for which Erbakan was convicted for had

[124] ECtHR (Decision), 16 November 2004, Case No. 23131/03, *Norwood v. U.K.*.
[125] ECtHR, *Jersild v. Denmark*, 23 September 1994. See also ECtHR, *Gündüz v. Turkey*, 4 December 2003.
[126] ECtHR, *Gündüz v. Turkey*, 4 December 2003 and ECtHR, *Kutlular v. Turkey*, 29 April 2008. See also ECtHR, *Otto-Preminger-Institut v. Austria*, 20 September 1994; ECtHR, *Wingrove v. U.K.,* 25 November 1996 and ECtHR, *I.A. v. Turkey*, 13 September 2005.
[127] ECtHR, *Féret v. Belgium,* 16 July 2009. See also ECtHR, *Soulas a.o. v. France,* 10 July 2008*;* ECtHR, *Balsytė-Lideikienė v. Lithuania*, 4 November 2008 and ECtHR, *Willem v. France,* 16 July 2009.
[128] ECtHR, *Willem v. France,* 16 July 2009.
[129] ECtHR, *Jersild v. Denmark*, 23 September 1994.
[130] ECtHR, *Lehideux and Isorni v. France*, 23 September 1998.
[131] ECtHR, *Gündüz v. Turkey*, 4 December 2003. See also ECtHR, *Giniewski v. France*, 31 January 2006 and ECtHR, *Aydin Tatlav v. Turkey*, 2 May 2006.

given rise to, or had been likely to give rise to, a "present risk" and an "imminent danger". The Court considered that the interference by the Turkish authorities had not been reasonably proportionate to the legitimate aims pursued, regard being had to the interest of a democratic society in ensuring and maintaining freedom of political debate.[132] In many cases against Turkey the Court found that the convictions or sanctions for separatist propaganda or incitement to hatred or hostility did violate Article 10, as the impugned statements, speeches, publications or programmes did, in the Court's view, not incite to violence or terrorism.[133]

In a recent judgment the Court was of the opinion that to persuade readers of a book of the legitimacy and inevitability of torture and summary executions in times of war during an important period in history, is not a decisive factor to exclude these statements from protection under Article 10 of the Convention. In the Court's view, the fact that the author of the book had not taken a critical stance with regard to these horrifying practices and that, instead of expressing regret, he had claimed to have been acting in accordance with the mission entrusted to him, formed an integral part of a witness account that unquestionably formed part of a debate on a matter of public concern which was of singular importance for the collective memory about an important period in a country's history. Accordingly, penalising a publisher for having assisted in the dissemination of such a witness account would seriously hamper contribution to the discussion on matters of public interest. As the Court in this case did not consider the content of the book as a glorification of war crimes, it came to the conclusion that the French courts had violated Article 10 of the Convention by convicting the publisher of the book.[134]

While the Court in some earlier cases accepted interferences in freedom of expression as to protect the religious feelings of others[135], its more recent case law is reflecting that defamation of a religious community or criticism of a religion is certainly not excluded from protection under Article 10. In the case *Giniewski v. France* the Court was of the opinion that the defamatory statements a journalist was convicted for, linking a popular doctrine developed by the Catholic Church with the origins of the Holocaust, did contribute though to the discussion of the various possible reasons behind the extermination of Jews in Europe, a question of indisputable public interest in a democratic society. The Court was of the opinion that the litigious article written by the journalist did not contain attacks on religious beliefs as such, but a view which the applicant had wished to express as a journalist and a historian. As the article had not been gratuitously offensive or insulting and had not incited disrespect or hatred, the Court found a violation of Article 10.[136] In the case *Aydin Tatlav v. Turkey*, the Court found the prosecution and conviction of a journalist for publishing a book designed to defile and offend a religion, a violation of freedom of expression. The Court was of the opinion that certain passages of the book contained strong criticism of religion in a social-political context. However, these passages had no insulting tone and neither contained an abusive attack against Muslims or against sacred symbols of Muslim religion. The Court did not exclude that Muslims could nonetheless feel offended by the caustic commentary on their religion, but this was not considered a sufficient reason to legitimise the criminal conviction of the author of the book.[137]

3.8. Toward a right of access to official documents

An important new characteristic is the Court's recent shift in approaching *access to public documents*

[132] ECtHR, *Erbakan v. Turkey*, 6 July 2006.

[133] See e.g. ECtHR, *Incal v. Turkey*, 9 June 1998; ECtHR, *Erdogdu and Ince v. Turkey*, 8 July 1999; ECtHR, *Karatas v. Turkey*, 8 July 1999; ECtHR, *Gerger v. Turkey*, 8 July 1999; ECtHR, *Sürek and Ozdemir v. Turkey*, 8 July 1999; ECtHR, *Ceylan v. Turkey*, 8 July 1999; ECtHR, *Özturk v. Turkey*, 28 September 1999; ECtHR, *Erdogdu v. Turkey*, 15 June 2000; ECtHR, *Sener v. Turkey*, 18 July 2000; ECtHR, *Ibrahim Aksoy v. Turkey*, 10 October 2000; ECtHR, *E.K. v. Turkey*, 7 February 2000; ECtHR, Karakoç a.o. v. Turkey, 15 October 2002; ECtHR, *Kizilyaprak v. Turkey*, 2 October 2003; ECtHR, *Koç and Tambaş v. Turkey*, 21 March 2006; ECtHR, *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey*, 30 March 2006; ECtHR, *Sevgi Yilmaz v. Turkey*, 11 April 2006; ECtHR, *Dicle v. Turkey,* 11 April 2006; ECtHR, *Varli e.a. v. Turkey*, 27 April 2006; ECtHR, *Alinak a.o. v. Turkey*, 4 May 2006; ECtHR, *Ergin (No. 6) v. Turkey*, 4 May 2006; ECtHR, *Eytisim Ltd. Şti. v. Turkey*, 22 June 2006; ECtHR, *Yesilgöz en Firik v. Turkey*, 27 June 2006; ECtHR, *Deniz v. Turkey*, 27 June 2007; ECtHR, *Çapan v. Turkey*, 25 July 2006; ECtHR, *Halis Doğan (No. 2) v. Turkey*, 25 July 2006; ECtHR, *Güzel (No. 2) v. Turkey,* 27 July 2006; ECtHR, *Ulusoy v. Turkey,* 31 July 2007 and ECtHR, *Bahçeci and Turan v. Turkey*, 16 June 2009.

[134] ECtHR, *Orban a.o. v. France*, 15 January 2009.

[135] ECtHR, *Otto-Preminger-Institut v. Austria*, 20 September 1994; ECtHR, *Wingrove v. U.K.*, 25 November 1996 and ECtHR, *I.A. v. Turkey*, 13 September 2005.

[136] ECtHR, *Giniewski v. France*, 31 January 2006.

[137] ECtHR, *Aydin Tatlav v. Turkey*, 2 May 2006.

from the perspective of Article 10 of the Convention. The Court for a long time has refused to apply Article 10 in cases of refusals of access to public documents. However, in a judgment of 2007 the Court expressed the opinion that "*particularly strong reasons must be provided for any measure affecting this role of the press and limiting* access *to information which the public has the right to receive*"[138], implicitly recognising at least a right of access to information. In the spring of 2009 the Court has delivered two important judgments in which it now has recognised the right of access to official documents. The Court made clear that when public bodies hold information that is needed for public debate, the refusal to provide documents in this matter to those who are requesting for access, is a violation of the right to freedom of expression and information guaranteed under Article 10 of the Convention. The case of *TASZ v. Hungary* concerns a request by the Hungarian Civil Liberties Union (*Társaság a Szabadságjogokért, TASZ*) to Hungary's Constitutional Court to disclose a parliamentarian's complaint questioning the legality of new criminal legislation concerning drug-related offences. The Constitutional Court refused to release the information. As the Court found that the applicant was involved in the legitimate gathering of information on a matter of public importance and that the Constitutional Court's monopoly of information amounted to a form of censorship, it concluded that the interference with the applicant's rights was a violation of Article 10 of the Convention. The European Court's judgment mentioned indeed the "*censorial power of an information monopoly*" when public bodies refuse to release information needed by the media or civil society organisations to perform their "watchdog" function. The Court referred to its consistent case law in which it has recognized that the public has a right to receive information of general interest and that the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern, even measures which merely make access to information more cumbersome. It was also underlined that the law cannot allow arbitrary restrictions which may become a form of indirect censorship in case the authorities would create obstacles to the gathering of information. This latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom. The Court emphasized once more that the function of the press, including the creation of forums of public debate, is not limited to the media or professional journalists. Indeed, in the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The Court recognized civil society's important contribution to the discussion of public affairs and qualified the applicant association, which is involved in human rights litigation, as a social "watchdog". The Court was of the opinion that in these circumstances the applicant's activities warrant Convention protection similar to that afforded to the press. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.[139]

The European Court's judgment in *TASZ v. Hungary* is obviously a new step in the direction of the recognition by the Court of a right of access to public documents under Article 10 of the Convention, although the Court is still reluctant to affirm this explicitly. The Court recalls that *"Article 10 does not (..) confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual"* and that *"it is difficult to derive from the Convention a general right of access to administrative data and documents"*. But the judgment also states that *"the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (..) and thereby towards the recognition of a right of access to information*", referring to its decision in the case of *Sdruženi Jiho?eské Matky v. Czech Republic.*[140] The Court notes that *"the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him"*. But it also considers that the State has an obliga-

[138] ECtHR, *Timpul Info-Magazine and Anghel v. Moldova*, 27 November 2007.
[139] ECtHR, *Társaság a Szabadságjogokért v. Hungary,* 14 April 2009.
[140] ECtHR (Decision) 10 July 2006, Case No. 19101/03, *Sdružení Jihočeské Matky v. Czech Republic*. See also W. Hins and D. Voorhoof, "Access to State-held information as a Fundamental Right under the European Convention on Human Rights, 3 *European Constitutional Law Review* (2007), p. 114-126.

tion not to impede the flow of information sought by a journalist or a an interested citizen.

Another judgment with Hungary as the defendant state concerns the attempt of a historian, Mr János Kenedi, to have access to certain documents deposited at the Ministry of the Interior regarding the functioning of the State Security Services in Hungary in the 1960s. Mr Kenedi, who earlier published several books on the functioning of secret services in totalitarian regimes, complained to the European Court about the Hungarian authorities' protracted reluctance to enforce a court order granting him unrestricted access to these documents. For several years Kenedi tried to get access to relevant information from the Ministry, but to no avail. After continued refusals, he obtained domestic court orders to enforce access. The Ministry, however, continued to obstruct, for example by requiring that Kenedi would sign a declaration of confidentiality. Kenedi refused, also because the Court order had not mentioned confidentiality as a requirement. At the moment of the proceedings in Strasbourg, Kenedi still did not have access to all documents he requested for. The European Court held unanimously that there had been a violation of Article 6 § 1 (*right to a fair hearing*) of the European Convention on Human Rights, on account of the excessively long proceedings - over ten years - with which Mr Kenedi sought to gain and enforce his access to documents concerning the Hungarian secret services. Also Article 10 was violated in the Court's view. It reiterated that "*access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression*". The Court noted that Mr Kenedi had obtained a court judgment granting him access to the documents in question, following which the domestic courts had repeatedly found in his favour in the ensuing enforcement proceedings. The administrative authorities had persistently resisted their obligation to comply with the domestic judgment, thus hindering Mr Kenedi's access to documents he needed to write his study. The Court concluded that the authorities had acted arbitrarily and in defiance of domestic law. Their obstructive actions had also led to the finding of a violation of Article 6 § 1 of the Convention. The Court held, therefore that the authorities had misused their powers by delaying Mr Kenedi's exercise of his right to freedom of expression, in violation of Article 10.[141] Hence, an important new development is that the Court recognises the applicability of the right to freedom of expression and information in matters of access to official documents, further expanding the scope of application of Article 10 of the Convention.[142] With this new approach the European Court of Human Rights is now in line with the Inter-American Court of Human Rights that in its judgment in the case of *Claude Reyes and others v. Chile* considered a refusal to give access to public documents to be a violation of the freedom of expression as enshrined in Article 13 of the Inter-American Convention on Human Rights, while stressing the connection between the right of access to official documents and democracy.[143]

3.9. The proportionality test

In its assessment whether an interference complained of is necessary in a democratic society, the Court integrates the *proportionality principle* : the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10. It is e.g. considerably more difficult to justify prior restraint (e.g. an injunction, a ban on a newspaper or TV-programme or a suspension of a broadcasting license)[144] than a subsequent criminal conviction or civil liability. In *Cump?n? and Maz?re v. Romania* the Court considered that by prohibiting the applicants from working as journalists as a preventive measure of general scope, albeit subject to a time-limit, the domestic courts had contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society.[145]

The Court indeed exercises the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern. The Court is of the opinion that "*investigative journalists are liable to be inhibited from reporting on matters*

[141] ECtHR, *Kenedi v. Hungary*, 26 May 2009. The Court came to the conclusion that in this case also Article 13 (*effective remedy*) had been violated, since the Hungarian system did not provide for an effective way of remedying the violation of the freedom of expression in this situation. The Court found that the procedure available in Hungary at the time and designed to remedy the violation of Mr Kenedi's Article 10 rights had been proven ineffective. There had, therefore, been a violation of Article 13 read in conjunction with Article 10 of the Convention.

[142] See also the European Convention on Access to Official Documents, 27 November 2008.

[143] IACtHR, *Claude Reyes a.o. v. Chile*, 19 September 2006 at <www.corteidh.or.cr>.

of general public interest (..) if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to prison or to a prohibition on the exercise of their profession".[146] The Court in this regards often refers to the ***risk of a "chilling effect".*** This means that also *ex post* sanctions must meet the proportionality test. Although sentencing is in principle a matter for the national courts, the Court considers that "*the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence*".[147] In some cases the Court has accepted that an interference reflected a pressing social need, but because of the severe character of the sanction, the too high amount of an award of damages[148] or a sentence to imprisonment[149], the Court found a violation of Article 10. Hence the nature and severity of the sanctions can be a reason for the Court *as such* to consider an interference as a violation of Article 10 of the Convention. In the case of *Cump?n? and Maz?re v. Romania* the Grand Chamber was of the opinion that a "classic case" of defamation in the context of a debate on a matter of legitimate public interest "*presents no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentence does not alter that conclusion*".[150] In *Mahmudov and Agazade v. Azerbaijan* the Court firmly stated that "*a prison sentence (..) by its very nature, has a chilling effect on the exercise of journalistic freedom*".[151] Also a suspended sanction can be considered in breach with Article 10. In the case of *Aydin Tatlav v. Turkey* the Court was of the opinion that a criminal conviction involving, moreover, the risk of a custodial sentence, could have the effect of discouraging authors and editors from publishing opinions about religion that were not conformist and could impede the protection of pluralism, which is indispensable for the healthy development of a democratic society.[152]

On the other hand, also a light or lenient sanction, or even an order of rectification or an admonishment can be a breach of Article 10.[153] The Court does not accept that the limited nature of the fine is decisive as regards the issue of necessity.[154] What is of greater importance is that the journalist was convicted. In some cases the Court considered that "*the proceedings were civil rather*

[144] Although Art. 10 does not prohibit as such prior restraint. See e.g. the minority opinion of judge De Meyer in ECtHR, *Wingrove v. U.K.,* 25 November 1996. Prior restraints on the activities of journalists and media call however for the most careful scrutiny by the Court and are justified only in exceptional circumstances. In the case of *Incal v. Turkey* the Court referred to "the radical nature of the interference in question. Its preventive aspect by itself raises problems under Article 10", ECtHR, *Incal v. Turkey*, 9 June1998. See also ECtHR, *Sunday Times (n° 1) v. U.K.*, 26 April 1979; ECtHR, *Müller a.o. v. Switzerland*, 24 May 1988; ECtHR, *Observer and Guardian v. U.K.* and *Sunday Times (n° 2) v. U.K.*, 26 November 1991; ECtHR, *Plon (Société) v. France*, 18 May 2004 and ECtHR (Grand Chamber), *Cumpănă and Mazăre v. Romania*, 17 December 2004. See also ECtHR, *Piermont v. France*, 27 April 1994; ECtHR, *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994; ECtHR, *News Verlags GmbK & CoKG v. Austria,* 11 January 2000; ECtHR *Association Ekin v. France*, 17 July 2001; ECtHR, *Çetin a.o. v. Turkey*, 13 February 2003; ECtHR, *Özgür Radyo v. Turkey*, 30 March 2006; ECtHR, *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. t. Turkey*, 30 March 2006, ECtHR, *Österreichischer Rundfunk v. Austria,* 7 December 2006 and ECtHR, *Woman on Waves v. Portugal*, 3 February 2009.

[145] ECtHR (Grand Chamber), *Cumpănă and Mazăre v. Romania*, 17 December 2004.

[146] ECtHR (Grand Chamber), *Cumpănă and Mazăre v. Romania*, 17 December 2004.

[147] ECtHR (Grand Chamber), *Cumpănă and Mazăre v. Romania*, 17 December 2004; ECtHR, *Mahmudov and Agazade v. Azerbaijan,* 18 December 2008 and ECtHR, *Dlugolęcki v. Poland,* 24 February 2009.

[148] ECtHR, *Tolstoy Miloslavsky v. U.K.*, 13 July 1995.

[149] ECtHR, *Skalka v. Poland*, 27 May 2003; ECtHR, *Saday v. Turkey*, 30 March 2006; ECtHR, *Lyaskho v. Ukraine*,10 Augustus 2006; ECtHR, *Artun and Güvener v. Turkey*, 26 June 2007; ECtHR, *Mahmudov and Agazade v. Azerbaijan*, 18 December 2008; ECtHR, *Mehmet Cevher Ilhan v. Turkey*, 13 January 2009 and ECtHR, *Marchenko v. Ukraine* 2009, 19 February 2009.

[150] ECtHR (Grand Chamber), *Cumpănă and Mazăre v. Romania*, 17 December 2004; ECtHR, *Dlugolęcki v. Poland,* 24 February 2009 and ECtHR, *Kydonis v. Greece*, 2 April 2009. See also Parliamentary Assembly of the Council of Europe, Resolution 1577 (2007), *Towards decriminalisation of defamation, PACE, 4 October 2007.* See however ECtHR (Grand Chamber), *Lindon, Otchakovsky-Laurens and July v. France,* 22 October 2007.

[151] ECtHR, *Mahmudov and Agazade v. Azerbaijan,* 18 December 2008.

[152] ECtHR, *Aydin Tatlav v. Turkey*, 2 May 2006. See also many other cases against Turkey, such as ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000; ECtHR, *Sener v. Turkey*, 8 July 1999; ECtHR, *E.K. v. Turkey*, 7 February 2002; ECtHR, *Seher Karatas v. Turkey*, 9 July 2002 and *Yalçin Küçük v. Turkey*, 22 April 2008.

[153] ECtHR, *Barfod v. Danmark,* 22 February 1989; ECtHR, *Casado Coca v. Spain*, 24 February 1994; ECtHR, *De Haes and Gijsels v. Belgium*, 24 February 1997; ECtHR, *Nikula v. Finland*, 21 March 2002; ECtHR, *Steur v. The Netherlands*, 28 oktober 2003; ECtHR, *Selistö v. Finland,*16 November 2004; ECtHR, *Turhan v. Turkey,* 19 May 2005; ECtHR, *Veraart v. the Netherlands*, 30 November 2006; ECtHR, *A.S. Diena and Ozoliņš v. Latvia*, 12 July 2007 and ECtHR, *Csánics v. Hungary*, 20 January 2009.

[154] ECtHR, *Selistö v. Finland,*16 November 2004.

than criminal in nature does not detract from the fact that the standards applied by the (..) courts were not compatible with the principles embodied in Article 10, since they did not adduce "relevant" and "sufficient" reasons justifying the interference at issue". When a legitimate interference has only a restricted and relevant impact, is sufficiently fine tuned, is not categorical or leaves the applicants sufficient other possibilities to express their opinions or impart information, this will be an additional argument for the Court to accept the justified character of an interference complained of in the light of Article 10[155], at least when a milder sanction was not possible[156] or when the interference was sufficiently limited in time or in space.[157] In the case of *Hachette Filipacchi v. France* the Court noted that the French courts had refused an application for an order to seize the offending copies of an issue of *Paris-Match* while they had ordered the magazine to publish a statement informing its readers that a photograph had been published without consent while its publication was an intrusion into the intimacy of the private life of the family concerned. The Court considered that the wording of the statement revealed the care the French courts had taken to respect the editorial freedom of *Paris-Match*. The Court considered that "*of all the sanctions which French legislation permitted, the order to publish the statement was the one which, both in principle and as regards its content, was the sanction entailing the least restrictions on exercise of the applicant company's rights*".[158] Regarding the publication of an apology the Court has noted that "*to make someone retract his or her own opinion by acknowledging his or her own wrongness is a doubtful form of redress and does not appear to be "necessary"*".[159]

Some kinds of interferences, by their very nature, have a disproportionate character. In the case of *Khursid Mustafa and Tarzibachi v. Sweden* the Court attached particular importance to the applicants' eviction from their flat in which they had lived for more than six years, because they refused to remove a satellite dish in their flat after the landlord had initiated proceedings against them. The Court considered "*that evicting the applicants and their three children from their home was a measure which cannot be considered proportionate to the aim pursued*".[160]

4. Conclusions and challenges

It is striking how the cases in relation to freedom of expression the European Court has dealt with often reflect the historical and contemporary "*traumas*" in the member states. Most cases against Turkey are related to the Kurdish question or discuss terrorism or freedom of expression in relation to religion. Many cases against Austria are about journalistic reporting and political debate on the alleged neo-nazi sympathies of politicians and racism or xenophobia in Austria. Cases against Italy are linked to the fight against the mafia and the role of the judiciary and politicians in this context. Cases against France refer to aspects of collaboration and resistance during the second world war, concern public debate or reporting on terrorism in the Basque region or Corsica, or refer to the role of France in the civil war in Algeria or the nuclear fall out in France due to the Chernobyl accident. Other cases deal with the role of the *Front National* and its (former) leader Jean-Marie Le Pen, while some cases in France have a high "presidential" character. Many cases in Russia, Moldova, Ukraine, Azerbaijan, Bulgaria and Romania are about corruption and fraud, sometimes in relation with mafia or (former) secret police. A major case against Norway concerns seal hunting. The Danish Jersild case had to do with upcoming xenophobia in Copenhagen and a Swedish case was linked to the investigation of the murder of Olof Palme, the Swedish prime minister killed in 1986. Some cases against Germany concerned freedom of expression and "berufsverbote" of members of communist or national-socialist parties, while cases against the United Kingdom concerned contempt of court, secret intelligence, libel or

[155] ECtHR, *Wabl v. Austria,* 21 March 2000; ECtHR, *Constantinescu v. Romania*, 27 June 2000; ECtHR, *Krone Verlag GmbH & CoKG and Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & CoKG*, 20 March 2003; ECtHR, *Murphy v. Ireland*, 10 July 2003; ECtHR, *Leempoel and SA Ciné Télé Revue v. Belgium*, 9 November 2006 and ECtHR, *Leroy v. France*, 2 October 2008. See also *Demuth v. Switzerland*, 5 November 2002; ECtHR, *Appleby v. U.K.*, 6 May 2003.

[156] See ECtHR, *Vogt v. Germany*, 26 September 1995; ECtHR, *Fuentes Bobo v. Spain,* 29 February 2000; ECtHR, *Nikula v. Finland*, 21 March 2002; ECtHR (Grand Chamber), *Guja v. Moldova*, 12 February 2008; ECtHR, *Kudeshkina v. Russia*, 26 February 2009 and ECtHR, *Wojtas-Kaleta* v. Poland, 16 July 2009.

[157] ECtHR, *Observer and Guardian v. U.K.*, 26 November 1991; ECtHR, *Sunday Times (n° 2) v. U.K.*, 26 November 1991; ECtHR, *Plon (Société) v. France*, 18 May 2004 and ECtHR, *Vereinigung Bildender Künstler v. Austria*, 25 January 2007.

[158] ECtHR, *Hachette Filipacchi Associés v. France*, 14 June 2007.

[159] ECtHR, *Kazakov v. Russia*, 18 December 2008. See also ECtHR, *Radio Twist v. Slovakia*, 19 December 2006. In another recent case the Court considered an apology to be an appropriate sanction: ECtHR, *Cihan Özturk v. Turkey*, 9 June 2009.

[160] ECtHR, *Khursid Mustafa and Tarzibachi v. Sweden*, 16 December 2008.

Close Circuit TV (CCTV). The Court's judgments against Belgium are related to cases of child abuse, the case of Mark Dutroux, the murder of the chairman of the socialist party, alleged corruption and bribery in the surroundings of the European Commission in Brussels, and incitement to racism and discrimination by a leader of a far right political party. A major case against Switzerland concerned a leaked confidential letter of an ambassador on the issue of financial compensations to Jewish families for unclaimed assets deposited at Swiss banks during the Holocaust. It is also striking that many cases are related to expressions, information and opinions coming up for respect for human rights, democracy, health and environment. How in other words in many cases citizens, journalists, media or NGOs were victim in their own country of an illegitimate interference in their right to freedom of expression contributing to a more sustainable society. It is obvious that in most of the judgments the Strasbourg Court has emphasized, definitely more than the national authorities, that the impugned press articles, publications or statements needed protection as they were contributing to public debate, and sometimes even to the transition and development towards democracy. The European Court's case law clearly reflects the idea that freedom of critical expression, pluralist media and independent journalistic reporting can help democracy to take root and to develop in a country.

Over the years, Article 10 of the Convention has been more and more incorporated in the domestic law and practice of (most of) the member states. Parliaments, legislators, governments, courts, judges, public prosecutors, police officers and administrative bodies are taking the right to freedom of expression and information more serious in its various dimensions and consequences. NGOs advocating freedom of expression, journalists' associations, legal journals, law faculties in their education and research programmes, newspapers and websites are contributing to a better understanding and to a committed awareness of the Strasbourg Court's case law in the area of freedom of expression and media regulation. Press freedom and freedom of expression is however never finally accomplished: the tension between the principle of freedom of expression in a democracy and the need for public or private interests to restrict this freedom urges to a permanent attempt to find a fair balance between the competing interests and values concerned, freedom of expression being however a precondition in a democratic society. The inherent paradox of Article 10 is that freedom of expression is considered as a necessity in a democratic society, while at the same time the restrictions and limitations on that freedom are justified as well as being necessary in a democratic society. According to the jurisprudence of the European Court in Strasbourg the test whether a restriction or sanction is necessary in a democratic society however needs to be a very strict one.

The challenge for the future is to bring more European Convention member states in line with the European Court's case law and to inspire, influence or persuade other states and regions in the world to upgrade freedom of expression of its citizens, to protect the freedom of newsgathering and independent and critical reporting by journalists and NGOs and to create more access to information and transparency on matters of interest for society. Protecting and effectively guaranteeing these rights are crucial in order to develop the quality of democracy, to stimulate diversity and tolerance, to guarantee the respect for human rights and ultimately to help to realise a more sustainable, and hence a better, world to live in. The jurisprudence of the European Court applying Article 10 of the European Convention is to be considered as an authoritative international standard regarding the protection of freedom of expression and information. Hence, it is very important to uphold, consolidate and further develop the high standards guaranteeing this right. The European Court of Human Rights itself should be very cautious not to reduce the acquired level of protection based on Article 10 of the Convention. The style or form of journalistic reporting and the techniques used for newsgathering should also in the future be highly protected under Article 10, in order to secure that the media, journalists, NGOs and citizens can play their role as social watchdogs. This indeed implies sometimes a sharp, disturbing, critical or provocative tone or approach. Two judges of the European Court of Human Right have recently emphasized the importance and the necessity of such an approach: "*'Watchdogs' are not meant to be peaceful puppies; their function is to bark and to disturb the appearance of peace whenever a menace threatens*".[161]

[161] ECtHR, *Saygili and Falakaoğlu (n° 2) v. Turkey*, 17 February 2009 (annex, dissenting opinion).